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IN THE

Supreme Court of the United States

OCTOBER TERM—1968

No. 1300

BOND TRANSPORTATION, INC.,
Petitioner,

vs.

EDWARD A. COX,
Respondent.

BOND TRANSPORTATION, INC.,
Petitioner,

vs.

MICHAEL F. MURPHY, etc., and DENNIS MURPHY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Citations to Opinions Below

The oral opinion of the trial Court (R. 2, pp. D322a to D325a) is unreported and is printed in Appendix B hereto,

infra, pp. 52a to 54a. The opinion of the New Jersey Superior Court Appellate Division printed in Appendix B hereto, *infra,* pp. 55a to 60a, is reported in 99 N. J. Super. 335, 240 A. 2d 14. The grant of certification by the New Jersey Supreme Court printed in Appendix B hereto, *infra,* p. 61a, is reported in 51 N. J. 571, 242 A. 2d 376. The opinion of the New Jersey Supreme Court printed in Appendix B hereto, *infra,* pp. 62a to 100a, is reported in 53 N. J. 186, 249 A. 2d 579.

Jurisdiction

The judgment of the New Jersey Supreme Court was rendered on January 27, 1969, printed in Appendix B, hereto, *infra,* p. 101a. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3). The question presented to this Court was raised at the time of trial by means of motions for involuntary dismissal made on behalf of defendant Bond Transportation Inc. as against the plaintiffs Cox and Murphy (R. 2, pp. D109a to D129a; D134a to D137a; D245a to D249a; printed in Appendix B, *infra,* pp. 34a to 43a; 43a to 46a). The question was specifically ruled upon by the trial Court at the time exceptions were taken to the charge (R. 2, pp. D288a to D299a; printed in Appendix B, *infra,* pp. 46a to 47a). The question was again specifically ruled upon by the trial Court at the time of motions made with respect to the entry of judgment (R. 2, pp. D308a to D325a; printed in Appendix B, *infra,* pp. 47a to 54a). The question here presented was specifically ruled upon in favor of the defendant Bond Transportation Inc. by the New Jersey Superior Court, Appellate Division printed in Appendix B hereto, *infra,* pp. 55a to 60a, which decision is reported in 99 N. J. Super. 335, 240 A. 2d 14. The judgment of the New Jersey Superior Court, Appellate Division above re-

ferred to was reversed by the New Jersey Supreme Court solely on the question here presented as stated in its opinion printed in Appendix B *infra,* pp. 62a to 100a which decision is reported in 53 N. J. 86, 249 A. 2d 579.

Question Presented

Whether a lessee motor carrier, duly franchised by the Interstate Commerce Commission, is vicariously liable solely by virtue of the Regulations of said Commission, specifically 49 C.F.R. 207.4 (1957), is printed in Appendix A, *infra,* pp. 4a to 13a, for the tortious conduct of a lessor-owner-operator, with respect to a motorized tractor when at the time said tractor was not being utilized in an activity in interstate commerce, nor one for which the franchise was required.

Statute Involved

The statutory provisions involved are Title 49, Part 207.1, 207.2, 207.3 and 207.4 of the Regulations of the Interstate Commerce Commission (printed in Appendix A, *infra,* pp. 1a to 13a), issued pursuant to the authority of the United States Congress as contained in Title 49 U. S. C. Secs. 301, 302, 303 and 304 (printed in Appendix A, *infra,* pp. 13a to 32a).

Statement[1]

In February 1964 Bond Transportation Inc., a motor carrier, duly franchised by the Interstate Commerce Com-

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[1] Although reference is made to the trial record in support of the facts herein asserted, this Statement of Facts is in complete accord with the factual findings set forth by the New Jersey Supreme Court in its decision in this case. No issue is herein raised as to the factual findings made by the New Jersey Supreme Court, and reference to the trial record is made merely for the convenience of the Court.

mission, entered into an agreement with one Manual McCaskill, the owner-operator of a motorized tractor, under the terms of which McCaskill was to haul for Bond utilizing his own tractor (R. 2, pp. D156a to D158a; D184a). Bond's operations encompassed both interstate and intrastate movement.[2] The agreement was oral (R. 2, p. D74a; p. D186a). McCaskill hauled sporadically for Bond up until November 30, 1964 (R. 2, pp. D156a to D166a; D365a). All of these haulage trips involved intrastate journeys within the State of New Jersey (R. 2, p. D365a; pp. D166a to D167a; pp. D172a to D173a). Commencing with the first week of December 1964 up until January 22, 1965, McCaskill hauled for Bond on a steady basis (R. 2, p. D365a). On December 7, 1964 McCaskill, in his tractor, made a trip from Brooklyn, New York, to Paulsboro, New Jersey, under the franchise of another franchised motor carrier, not a party to this litigation (R. 2, p. D191a; p. D363a). All other haulage trips between December 7, 1964 and January 22, 1965 performed for Bond by McCaskill, were entirely within the State of New Jersey (R. 2, p. D84a; pp. D363a to D365a; pp. D166a to D167a; pp. D172a to D173a).

On January 22, 1965, McCaskill made four hauls for Bond between Newark, New Jersey and Whippany, New Jersey (R. 2, p. D92a; p. D365a). At the conclusion of the day's work, McCaskill returned to Bond's terminal in Woodbridge, New Jersey, detached his tractor from the trailer, and was returning in his tractor to his home in Long Branch, New Jersey, when through his negligent operation of his tractor he was involved in a multi-vehicular

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[2] This factual finding was made by the New Jersey Supreme Court in its decision and is not questioned by petitioner. See decision printed in Appendix B, *infra*, P64a.

collision, causing injuries and damages to the plaintiffs Cox and Murphy (R. 2, p. D93a; p. D232a). At the time of the accident Bond's interstate decal and franchise number were affixed to McCaskill's tractor, although the accident was in no way connected with an interstate or franchised transportation (R. 2, p. D359a; p. D376a; pp. D142a to D143a).

The trial Court imposed liability vicariously on Bond for the tortious conduct of McCaskill solely on the basis of the responsibility allegedly imposed by the Interstate Commerce Commission by virtue of its Regulation 207.4 (R. 2, pp. D237a to D238a; pp. D239a to D240a; pp. D244a to D245a).

Bond duly filed an appeal with the New Jersey Superior Court Appellate Division (R. 1). That Court unanimously reversed, holding that as a matter of law vicarious liability could not be imposed on Bond, on the facts presented, by virtue of the regulations. It remanded the matter to the trial Court with directions to enter judgments against plaintiffs and in favor of Bond (R. 13; reported in 99 N. J. Super. 335; 240 A. 2d 14, printed in Appendix B, *infra,* pp. 55a to 60a).

The mandate was stayed by the timely filing of plaintiffs' Petition for Certification to the New Jersey Supreme Court (R. 4). Plaintiff's petition for certification was granted by the New Jersey Supreme Court on May 14, 1968, printed in Appendix B hereto, *infra,* p. 61a, which is reported in 51 N. J. 571, 242 A. 2d 376.

The New Jersey Supreme Court on January 27, 1969 reversed the Superior Court Appellate Division and ordered the judgments of the trial Court in favor of plaintiffs reinstated (R. 13, printed in Appendix B *infra,* pp. 62a to 100a, reported in 53 N. J. 186, 249 A. 2d 579). The

New Jersey Supreme Court specifically imposed liability on Bond by virtue of Title 49 Part 1057.4 of the Regulations of the Interstate Commerce Commission,[3] ruling that there is no requirement that the lessor-operator (McCaskill) must be driving in interstate transportation, or franchised movement at the time of the accident in order for the vicarious liability envisioned by the regulations to exist.

Reasons for Granting the Writ

1. The decision of the Court below is directly in conflict with the decision of the Court of Appeals of Maryland in *Schmidbauer* v. *Baltimore & Pittsburg Motor Exp. Co.* printed in Appendix C, hereto, *infra,* pp. 102a to 119a, reported in 228 Md. 637, 181 A. 2d 325 (1962). This conflict was conceded by the Court below in the majority opinion (Appendix B, *infra,* p. 84a; 53 N. J. 186,.208, 249 A. 2d 579, 590). The decision of the Court below is in direct conflict with the decisions of at least two other state courts of final resort (*Simon* v. *McCullough Transfer Co., Inc.* printed in Appendix C, hereto, *infra,* pp. 119a to 134a reported in 155 Ohio St. 104, 98 N. E. 2d 19 (1951) and *Eckard* v. *Johnson* printed in Appendix C, hereto, *infra,* pp. 134a to 143a reported in 235 N. C. 538, 70 S. E. 2d 488 (1952)).

2. The decision of the Court below, if not in direct conflict with decisions of various Circuits of the United States Court of Appeals, is at least contrary to the apparent thrust of those decisions. (For representative decisions see *Costello* v. *Smith,* 179 F. 2d 715 (2d Cir. 1950); *Mellon*

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[3] The New Jersey Supreme Court refers to the Interstate Commerce Commission Regulation as 49 C.F.R. 1057 (1968); on the day of the accident the Regulation was known as 49 C.F.R. 207.4. A numbering change occurred in 1968 but no change in substance was effected.

Nat. Bank & Trust Co. v. *Sophie Lines Inc.*, 289 Fed. 2d 473 (3d Cir. 1961); *Venuto* v. *Robinson*, 118 F. 2d 679 (3d Cir. 1941), *cert. denied*, 314 U. S. 627, 1941). It seems of utmost importance to note that in each of these decisions, the Court went to great lengths to point out that at the time of the incident then in question a franchised interstate movement was actually in progress. The decision below is manifestly contrary to the clear import of a relatively recent decision for the Seventh Circuit of the United States Court of Appeals (*Gudgel* v. *Southern Shippers, Inc.*, 387 F. 2d 723 (7th Cir. 1967), printed in Appendix C, *infra*, at pp. 144a to 155a). In *Gudgel* Chief Judge Hastings, speaking for the Court, stated:

> "A common carrier operating under an Interstate Commerce Commission certificate is liable for the negligence of an independent contractor operating equipment leased to the carrier, if the contractor is operating by authority of the carrier's I.C.C. certificate and is carrying out the carrier's undertaking. Mellon Nat'l Bank & Trust Co. v. Sophie Lines, Inc. 3 Cir. 289 F. 2d 473 (1961); Venuto v. Robinson, 3 Cir. 118 F. 2d 679 (1941), cert. den. C. A. Ross Agent, Inc. v. Venuto, 314 U. S. 627, 62 S. Ct. 58, 86 L. Ed. 504 (1941); Beers v. Indianapolis Forwarding Co., 43 Ill. App. 2d 303, 193 N. E. 2d 473 (1963); Louis v. Youngren, 12 Ill. App. 2d 198, 138 N. E. 2d 696 (1956). This is based on Restatement of the Law of Torts, §428.
>
> 'An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise, granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a con-

tractor employed to do work in carrying on the activity'" (387 F. 2d 723, 725 printed in Appendix C, *infra*, p. 147a).

3. The matter thus is clearly in dispute as between State Courts of final resort, and must remain so until settled by the Supreme Court of the United States.[4] It seems classically anomalous that in identical factual situations different State Courts interpreting the same federal regulations have reached diametrically opposed results. When this anomaly is heightened by the frequent recurrence of similar fact situations in a nation wide industry, the result can only spawn a critical divergency. The regulation in question (49 C.F.R. 207.4) essentially deals with the responsibility of a franchised carrier with respect to the use of augmenting equipment. No serious doubt can exist that this responsibility is primarily financial. Under the present conflicting status of the law, a motor carrier franchised by the Interstate Commerce Commission, operating essentially in New Jersey, is financially burdened by tort exposure and practical accompanying expenses, far in excess of his counterpart operating under an identical franchise in a sister state. This basic inequity distinctly calls for relief.

4. A State Court imbued with a definitive philosophy of tort liability should not be permitted, under the guise of interpretation, to impose this philosophy in a field in which its authority has been preempted, when no such interpretation is either reasonable or credible. When such judicial action persists in State Courts of final resort, an individual's rights can be restored only by means of his petition for redress to the Supreme Court of the United States.

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[4] In his concurring opinion below, Justice Hall succinctly stated that the issue was one of Federal law and one on which the Supreme Court of the United States had not definitively spoken.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

CARROLL A. MORLEY,
Counsel for Petitioner,
Bond Transportation, Inc.

[APPENDICES FOLLOW]

APPENDIX A

(Statutes Involved)

PART 207—LEASE AND INTERCHANGE OF VEHICLES

Sec.

207.1 Applicability.

207.2 Definitions.

207.3 Exemptions.

207.4 Augmenting equipment.

AUTHORITY: §§ 207.1 to 207.6 issued under sec. 204, 49 Stat. 546, as amended; 49 U.S.C. 304.

SOURCE: §§ 207.1 to 207.6 appear at 21 F.R. 9653, Dec. 6, 1956, except as otherwise noted.

§ 207.1 APPLICABILITY.

The rules and regulations in this part apply to the augmenting of equipment by common and contract carriers of property by motor vehicle in interstate or foreign commerce subject to Part II of the Interstate Commerce Act, 49 U.S.C. 301 et seq.; to the interchange of equipment between such common carriers of property by motor vehicle, and to the lease of equipment by common and contract carriers of property by motor vehicle with or without drivers, to private motor carriers and shippers.

§ 207.2 DEFINITIONS.

(a) *Authorized carrier.* A person or persons authorized to engage in the transportation of property as a common or contract carrier under the provisions of section 206, 207, or 209 of the Interstate Commerce Act, 49 U.S.C. 306, 307, or 309.

Appendix A

(b) *Equipment.* A motor vehicle, straight truck, tractor, semitrailer, full trailer, combination tractor-and-trailer, combination straight truck and full trailer, and any other type of equipment used by authorized carriers in the transportation of property for hire.

(c) *Interchange of equipment.* The physical exchange of equipment between motor common carriers or the receipt by one such carrier of equipment from another such carrier, in furtherance of a through movement of traffic, at a point or points which such carriers are authorized to serve.

(d) *Regular employee.* A person not merely an agent but regularly in exclusive full-time employment.

(e) *Agent.* A person duly authorized to act for and on behalf of an authorized carrier.

(f) *Owner.* A person (1) to whom title to equipment has been issued, or (2) who as lessee, has the right to exclusive use of equipment for a period longer than 30 days, or (3) who has lawful possession of equipment and has the same registered and licensed in any State or States or the District of Columbia in his or its name.

(g) *Private carrier.* A person as defined in § 203 (a) (17) of the Interstate Commerce Act.

(h) *Shipper.* A person who consigns or receives property which is transported in interstate or foreign commerce.

[21 F.R. 9653, Dec. 6, 1956, as amended at 26 F.R. 786, Jan. 26, 1961]

Appendix A

§ 207.3 EXEMPTIONS.

The provisions of § 207.4, except paragraphs (c) and (d), relative to inspection and identification of equipment, shall not apply:

(a) *Equipment used in the direction of a point which lessor is authorized to serve.* To equipment owned or held under a lease of 30 days or more by an authorized carrier and regularly used by it in the service authorized, and leased by it to another authorized carrier for transportation in the direction of a point which lessor is authorized to serve: *Provided,* That the two carriers have first agreed in writing that control and responsibility for the operation of the equipment shall be that of the lessee from the time the equipment passes the inspection required to be made by lessee or its representative under § 207.4(c) until such time as the lessor or its representative shall give to the lessee or its representative a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is retaken or until such time as the required inspection is completed by another authorized carrier taking possession of the equipment in an interchange of equipment where such use is contemplated, such writing to be signed by the parties or their duly authorized regular employees or agents, and a copy thereof carried in the equipment while the equipment is in the possession of the lessee.

(b) *Rail or express vehicles.* To equipment utilized wholly or in part in the transportation of railway express traffic, or in substituted motor-for-rail transportation of railroad freight moving between points that are railroad stations on railroad billing.

(c) *Commercial zone operations.* To equipment utilized in transportation performed solely and exclusively within any municipality, contiguous municipalities, or commercial zone, as defined by the Commission.

(d) *Vehicles without drivers from rental companies.* To the lease of equipment without drivers by an authorized carrier from an individual, copartnership, or corporation, whose principal business is the leasing of equipment without drivers for compensation.

(e) *Non-powered equipment.* To equipment other than a power unit, provided that such equipment is not drawn by a power unit leased from the lessor of such equipment.

[21 F.R. 9653, Dec. 6, 1956, as amended at 27 F.R. 6547, July 11, 1962]

§ 207.4 AUGMENTING EQUIPMENT.

Other than equipment exchanged between motor common carriers in interchange service as defined in §207.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:

(1) *Parties.* Shall be made between the authorized carrier and the owner of the equipment.

(2) *Written contract required.* Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangements.

Appendix A

(3) *Minimum duration of 30 days when operated by lessor.* Shall specify the period for which it applies, which shall be not less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee of the owner; excepting:

(i) *Equipment used in agricultural or perishable operations.* That such 30-day minimum period shall not apply to equipment, with driver, of a farmer, agricultural cooperative or private carrier of certain perishable property or which is exempt under section 203 (b) (6) of the act, to the extent that such equipment falls within the terms of the exceptions of section 204 (f) (1) or (2) of the act (49 U.S.C. 304 (f), and is utilized in accordance therewith; *Provided,* That prior to the execution of the lease, the authorized carrier receives and retains a statement signed by the owner of the equipment, or someone duly authorized to sign for the owner, authorizing the driver to lease the equipment for the movement or movements contemplated by the lease, certifying that the equipment so leased meets the qualifications enumerated in section 204 (f) (1) or (2) of the act, and specifying the origin, destination, and the time of the beginning and ending of the last movement which brought the equipment within the purview of section 204 (f).

(ii) *Automobile and tank truck carriers.* That equipment owned by an automobile carrier or tank truck carrier or held by such authorized carriers under lawful leases and used in the transportation of motor vehicles or commodities in bulk, respectively, may be leased or subleased to other such authorized carriers.

Appendix A

(iii) *Ice and snow control purposes.* That such 30-day minimum period shall not apply to dump equipment leased or subleased for use in transporting salt and calcium chloride, in bulk, for ice and snow control purposes, during the period from November 1 to April 30, both inclusive, of each year.

(4) *Exclusive possession and responsibility.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except;

(i) *Lessee may be considered as owner.* Provision may be made therein for considering the lessee as the owner for the purpose of subleasing under these rules to other authorized carriers during such duration.

(ii) *Household goods, carriers; intermittent operations under long-term lease.* When entered into by authorized carriers of household goods, for the transportation of household goods, as defined by the Commission, such provisions need only apply during the period the equipment is operated by or for the authorized carrier, lessee.

(5) *Compensation to be specified.* Shall specify the compensation to be paid by the lessee for the rental of the leased equipment.

(6) *Duration to be specific.* Shall specify the time and date or the circumstances on which the contract, lease, or other arrangement begins, and the time or the circumstances on which it ends. The duration of the contract, lease or other arrangement shall coincide with the time

for the giving of receipts for the equipment, as required by paragraph (b) of this section; and

(7) *Copies of lease and their distribution; copy to be carried on vehicle.* Shall be executed in triplicate; the original shall be retained by the authorized carrier in whose service the equipment is to be operated, one copy shall be retained by the owner of the equipment, one copy shall be carried on the equipment specified therein during the entire period of the contract, lease, or other arrangement, unless a certificate as provided in paragraph (d) (2) of this section is carried in lieu thereof.

(b) *Receipts for equipment to be specific.* When possession of the equipment is taken by the authorized carrier or its regular employee or agent duly authorized to act for it, said carrier, employee or agent shall give to the owner of the equipment, or the owner's employee or agent a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is taken; and when the possession by the authorized carrier ends; it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifying the equipment and stating therein the date and the time of day possession thereof is taken.

(c) *Safety inspection of equipment by the authorized carrier.* It shall be the duty of the authorized carrier, before taking possession of equipment, to inspect the same or to have the same inspected by a person who is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection

as a representative of the carrier, in order to insure that the said equipment complies with Parts 193 and 196 of this chapter (Motor Carrier Safety Regulations (Rev.), pertaining to "Parts and Accessories Necessary for Safe Operation," and "Inspection and Maintenance,") and if explosives or other dangerous articles are to be transported thereon, further to inspect and check such vehicles or equipment to insure that they or it complies with Part 197 of this chapter (safety regulations pertaining to "Safe Transportation of Explosives"). The person making the inspection shall certify the results thereof on a report in the form hereinafter set forth, which report shall be retained and preserved by the authorized carrier, and if his inspection discloses that the equipment does not comply with the requirements of the said safety regulations, possession thereof shall not be taken. In all instances in which the inspection required by this section is made, the authorized carrier, if an individual, or a member of the co-partnershp if the authorized carrier is a co-partnership, or one of the officials thereof if the authorized carrier is a corporation, shall certify on the inspection report that the person who made the inspection, whether an employee or person other than an employee, is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of such authorized carrier. When equipment other than a power unit is leased, a form of report applicable to such equipment may be used.

REPORT OF VEHICLE INSPECTION

Description of vehicle:

Model ..... Serial No. .....

Make ..... Year .....

Appendix A

Type: Tractor ..... Trailer .....

Semitrailer .....

License plate: No. ..... State .....

Owner's name .....

Name of authorized carrier .....

Indicate in the proper column the result of the inspection of each item listed:

Item	*Not Defective*	*Defective*	*Description of defect*
Body			
Brakes			
Cooling system			
Drive line			
Emergency equipment			
Engine			
Exhaust			
Fuel system			
Glass			
Horn			
Leaks			
Lights (state which)			
Reflectors			

Appendix A

Item	*Not Defective*	*Defective*	*Description of defect*
Speedometer			
Springs			
Steering			
Tires			
Wheels			
Windshield wiper			
Any other items requiring attention			

I hereby certify that on the ..... day of .....
I carefully inspected the equipment described above and that this is a true and correct report of the result of such inspection.

.....
(Signature of person making inspection)

I hereby certify that on the date stated above the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such inspection as a representative of

.....
(Name of authorized carrier)

Appendix A

.....

(Signature of authorized carrier or co-partner or officer of authorized carrier)

Date: .....

(d) *Identification of equipment as that of the authorized carrier.* The authorized carrier acquiring the use of equipment under this section shall properly and correctly identify such carrier, during the period of the lease, contract, or other arrangement in accordance with the Commission's requirements in Ex Parte No. MC-41; Part 166 of this chapter (Identification of Motor-Carrier Vehicles). If a removable device is used to identify the authorized carrier as the operating carrier, such device shall be on durable material such as wood, plastic, or metal, and bear a serial number in the authorized carrier's own series so as to keep proper record of each of the identification devices in use.

(1) *Identification to be removed when lease terminated.* The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment.

(2) *Certified statement may be carried on vehicle in lieu of lease.* Unless a copy of the lease, contract or other arrangement is carried on the equipment, as provided in paragraph (a) (7) of this section, the authorized carrier or its regular employee or agent shall prepare a state-

ment certifying that the equipment is being operated by it, which shall specify the name of the owner, the date of the lease, contract or other arrangement, the period thereof, any restrictions therein relative to the commodities to be transported, and the location of the premises where the original of the lease, contract or other arrangement is kept by the authorized carrier, which certificate shall be carried with the equipment at all times during the entire period of the lease, contract, or other arrangement.

(e) *Driver of equipment to be in compliance with safety regulations.* Before any person other than a regular employee of the authorized carrier is assigned to drive equipment operated under this part, it shall be the duty of the authorized carrier to make certain that such driver is familiar with, and that his employment as a driver will not result in, violation of any provision of Parts 192, 193, 195, and 196 of this chapter (Motor Carrier Safety Regulations (Rev.) pertaining to "Driving of Motor Vehicles," "Parts and Accessories Necessary for Safe Operation," "Hours of Service of Drivers," and "Inspection and Maintenance,") and to require such driver to furnish a certificate of physical examination in accordance with Part 191 of this chapter (Motor Carrier Safety Regulations (Rev.) pertaining to "Qualifications of Drivers,") or, in lieu thereof, a photostatic copy of the original certificate of physicial examination, which shall be retained in the authorized carrier's file.

(f) *Record of equipment to be maintained; shipping documents to identify the authorized carrier.* The authorized carrier utilizing equipment operated under this part for periods of less than 30 days shall prepare and keep

a manifest or other documents covering each trip for which the equipment is used in its service, containing the name and address of the owner of such equipment; point of origin, the time and date of departure, the point of final destination, and the authorized carrier's serial number of any identification device affixed to the equipment. During the time that equipment subject to this part is operated there shall be carried with the equipment, bills of lading, waybills, freight bills, manifests or other papers identifying the lading, and containing the foregoing information, which shall clearly indicate that the transportation of the property carried is under the responsibility of the authorized carrier, which papers shall be preserved by the authorized carrier. This section shall also apply with respect to vehicles leased for periods of 30 days or more unless the required information is kept at a terminal or office as a part of the records of the authorized carrier.

[21 F.R. 9653, Dec. 6, 1956, as amended at 27 F.R. 746, Jan. 25, 1962; 28 F.R. 264, Jan. 10, 1963]

* * *

49 U.S.C. § 301 MOTOR CARRIERS Ch. 8

* * *

§ 301. SHORT TITLE

This chapter may be cited as part II of the Interstate Commerce Act. Feb. 4, 1887, c. 104, Pt. II, § 201, as added Aug. 9, 1935, c. 498, 49 Stat. 543, and amended Sept. 18, 1940, c. 722, Title I, § 15, 54 Stat. 919.

Appendix A

§ 302. APPLICATION OF PROVISIONS

(a) The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provisions of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is vested in the Interstate Commerce Commission.

(b) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

(c) Notwithstanding any provision of this section or of section 303 of this title, the provisions of this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to chapter 1 of this title, or by a water carrier subject to chapter 12 of this title, or by a freight forwarder subject to chapter 13 of this title, incidental to transportation or service subject to such chapters, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be

considered to be and shall be regulated as transportation subject to chapter 1 of this title when performed by such carrier by railroad, as transportation subject to chapter 12 of this title, when performed by such water carrier, and as transportation or service subject to chapter 13 of this title when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to this chapter, a water-carrier subject to chapter 12 of this title, or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

Feb. 4, 1887, c. 104, Pt. II, § 202, as added Aug. 9, 1935, c. 498, 49 Stat. 543, and amended Sept. 18, 1940, c. 722, Title I, § 17, 54 Stat. 920; May 16, 1942, c. 318, § 2, 56 Stat. 300.

§ 303. DEFINITIONS AND EXCEPTIONS—DEFINITIONS

(a) As used in this chapter—

(1) The term "person" means any individual, firm, copartnership, corporation, company, association, or joint-

stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

(2) The term "board" or "State board" means the commission, board, or official (by whatever name designated in the laws of a State) which, under the laws of any State in which any part of the service in interstate or foreign commerce regulated by this chapter is performed, has or may hereafter have jurisdiction to grant or approve certificates of public convenience and necessity or permits to motor carriers, or otherwise to regulate the business of transportation by motor vehicles, in intrastate commerce over the highways of such State.

(3) The term "Commission" means the Interstate Commerce Commission.

(4) The term "joint board" means any special board constituted as provided in section 305 of this title.

(5) The term "certificate" means a certificate of public convenience and necessity issued under this chapter to common carriers by motor vehicle.

(6) The term "permit" means a permit issued under this chapter to contract carriers by motor vehicle.

(7) The term "license" means a license issued under this chapter to a broker.

(8) The term "State" means any of the several States or the District of Columbia; and the term "United States" means the several States and the District of Columbia.

(9) The term "express company" means any common carrier by express subject to the provisions of chapter 1 of this title.

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water; *Provided,* That to the extent that such transportation in "interstate commerce" between points in Alaska and points in other States is performed within a foreign country, the application of this chapter shall not include any requirement as to conduct in such foreign country which is in conflict with a requirment of such foreign country, but shall include as a condition to engaging in such operations within the jurisdiction of the United States, the observance, as to the entire service, of the requirements of this chapter with respect to rates, fares, charges, and practices pertaining to such transportation.

(11) The term "foreign commerce" means commerce, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water, (A) between any place in the United States and any place in a foreign country, or between places in the United States through a foreign country; or (B) between any place in the United States and any place in a Territory or possession of the United States insofar as such transportation takes place within the United States. The term "foreign commerce" also includes transportation between places in a foreign country or between a place in

one foreign country and a place in another foreign country, insofar as such transportation takes place within the United States, but only for purposes of the application, to carriers engaged in such transportation, of the following provisions of this chapter: section 315 of this title (which relates to insurance for the protection of the public), section 321 of this title (which relates to designation of an agent for service of process), and those provisions of section 304 of this title which relate to qualifications and maximum hours of service of employees and safety of operation and equipment.

(12) The term "highway" means the roads, highways, streets, and ways in any State.

(13) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that

such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this subsection and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

(18) The term "broker" means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, who or which, as principal

or agent, sells or offers for sale any transportation subject to this chapter, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation.

(19) The "services" and "transportation" to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers, and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

(20) The term "interstate operation" means any operation in interstate commerce.

(21) The term "foreign operation" means any operation in foreign commerce.

(22) The term "carrier of migrant workers by motor vehicle" means any person, including any "contract carrier by motor vehicle", but not including any "common carrier by motor vehicle", who or which transports in interstate or foreign commerce at any one time three or more migrant workers to or from their employment by any motor vehicle other than a passenger automobile or station wagon, except migrant workers transporting themselves or their immediate families.

(23) The term "migrant worker" means any individual proceeding to or returning from employment in agricul-

ture as defined in section 203(f) of Title 29, or section 3121(g) of Title 26, Internal Revenue Code of 1954.

VEHICLES EXCEPTED FROM OPERATION OF LAW

(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural (including horticultural) commodities and products thereof, or in the transportation of supplies to his farm; or (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined; or (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including

shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: *Provided,* That the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": *Provided further, however,* That notwithstanding the preceding proviso the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products); (7) motor vehicles used exclusively in the distribution of newspapers; or (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft; nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this chapter, except the provisions of sec-

tion 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this chapter or under a pending application for such a certificate or permit.

Appendix A

CERTIFICATE OR PERMIT; TRANSPORTATION WITHIN SCOPE, AND IN FURTHERANCE, OF PRIMARY BUSINESS ENTERPRISE

(c) Except as provided in section 302(c) of this title, subsection (b) of this section, in the exception in subsection (a) (14) of this section, and in the second proviso in section 306(a) (1) of this title, no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person. Feb. 4, 1887, c. 104, Pt. II, § 203, as added Aug. 9, 1935, c. 498, 49 Stat. 544, and amended June 23, 1938, c. 601, § 1107(j), 52 Stat. 1029; June 29, 1938, c. 811, §§ 2, 3, 52 Stat. 1237; Sept. 18, 1940, c. 722, Title I, §§ 16, 18, 54 Stat. 919, 920; Sept. 1, 1950, c. 835, § 1, 64 Stat. 574; July 9, 1952, c. 599, 66 Stat. 479; July 22, 1954, c. 563, § 1, 68 Stat. 526; Aug. 3, 1956, c. 905, § 1, 70 Stat. 958; Aug. 22, 1957, Pub.L. 85-163, § 1(1), (2), 71 Stat. 411; Aug. 12, 1958, Pub.L. 85-625, §§ 7(a), 8, 72 Stat. 573, 574; July 12, 1960, Pub.L. 86-615, § 3, 74 Stat. 384.

§ 304. POWERS AND DUTIES OF COMMISSION—POWERS AND DUTIES GENERALLY

(a) It shall be the duty of the Commission—

Appendix A

(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322(a), (b), (d), (f), and (g), and 324 of this title.

(3a) Notwithstanding any other provision of section 303(b) of this title, to establish for carriers of migrant workers by motor vehicle reasonable requirements with respect to comfort of passengers, qualifications and maximum hours of service of operators, and safety of operation and equipment. Such requirements shall apply to any

such carrier only in the case of transportation of any migrant worker for a total distance of more than seventy-five miles, and then only if such transportation is across the boundary line of any State, the District of Columbia, or Territory of the United States, or a foreign country. When such requirements are established, the term "motor carrier" shall be construed to include carriers of migrant workers by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322(a), (b), (d), (f) and (g), and 324 of this title.

(4) To regulate brokers as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to licensing, financial responsibility, accounts, records, reports, operations, and practices of any such person or persons.

(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this chapter, and shall attach to

such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in this Act. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in interstate or foreign commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this subparagraph, except after reasonable opportunity for hearing to interested parties. Where an application is made in good faith for the exemption of a motor carrier under this subparagraph, accompanied by a certificate of a State board of the State in which the operations of such carrier are carried on stating that in the opinion of such board such carrier is entitled to a certificate of exemption under this subparagraph, such carrier shall be exempt from the provisions of this chapter beginning with the sixtieth day following the making of such application to the Commission unless prior to such time the Commission shall have by order denied such application, and such exemption shall be effective until such time as the Commission, after such

sixtieth day, may by order deny such application or may by order revoke all or any part thereof as hereinbefore authorized. In any case where a motor carrier has become exempt from the provisions of this chapter as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption. Applications under this subparagraph shall be made in writing to the Commission, verified under oath, and shall be in such form and contain such information as the Commission shall by regulations require.

(5) For the purpose of carrying out the provisions pertaining to safety, the Commission may avail itself of the assistance of any of the several research agencies of the Federal Government having special knowledge of any such matter, to conduct such scientific and technical researches, investigations, and tests as may be necessary to promote the safety of operation and equipment of motor vehicles as provided in this chapter; the Commission may transfer to such agency or agencies such funds as may be necessary and available to make this provision effective.

(6) To administer, execute, and enforce all provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

(7) For purposes of the administration of the provisions of this chapter, to inquire into the management of the business of motor carriers and brokers, and into the management of the business of persons controlling, con-

trolled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time, such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary.

CLASSIFICATION OF MOTOR CARRIERS

(b) The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle", or "contract carrier by motor vehicle", as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this chapter, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

INVESTIGATION OF COMPLAINTS; ORDERS

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such

investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

APPLICATION OF SECTIONS 14 AND 16(13) OF THIS TITLE

((d) The provisions of sections 14 and 16(13) of this title, relating to reports, decisions, schedules, contracts, and other public records, shall apply in the administration of this chapter.

REGULATIONS GOVERNING USE OF VEHICLES OWNED BY OTHERS

(e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor ve-

hicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

EXCEPTIONS TO REGULATIONS FOR USE OF VEHICLES OWNED BY OTHERS

(f) Nothing in this chapter shall be construed to authorize the Commission to regulate the duration of any such lease, contract, or other arrangement for the use of any motor vehicle, with driver, or the amount of compensation to be paid for such use—

(1) where the motor vehicle so to be used is that of a farmer or of a cooperative association or a federation of cooperative associations, as specified in section 303(b) (4a) or (5) of this title, or is that of a private carrier of property by motor vehicle as defined in section 303(a) (17) of this title and is used regularly in the transportation of property of a character embraced within section 303(b) (6) of this title or perishable products manufactured from perishable property of a character embraced within section 303(b) (6) of this title, and such motor vehicle is to be used by the motor carrier in a single

movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(2) where the motor vehicle so to be used is one which has completed a movement covered by section 303(b) (6) of this title and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based.

Feb. 4, 1887, c. 104, Pt. II, § 204, as added Aug. 9, 1935, c. 498, 49 Stat. 546, and amended June 29, 1938, c. 811, § 4, 52 Stat. 1237; Sept. 18, 1940, c. 722, Title I, §§ 19, 20(a, b), 54 Stat. 921, 922; Mar. 27, 1942, 3 p.m., E.W.T., c. 199, Title I, § 101, 56 Stat. 176; Aug. 3, 1956, c. 905, § 2, 70 Stat. 958; Aug. 3, 1956, c. 928, 70 Stat. 983.

* * *

28 U.S.C. § 1257. STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX B

(Decisions, Opinions and Judgments Below)

(PROCEEDINGS IN TRIAL COURT—PAGES 109a TO 325a OF DEFENDANT'S APPENDIX)

* * *

Mr. Morley: Thank you, sir.

If your Honor please, at this time I should like to move for a judgment of involuntary dismissal on behalf of the defendant, Bond Transportation, with respect to the plaintiff, Cox, on the grounds that the plaintiff has failed to establish in law any question of fact or law with respect to any liability that could attach with respect to the defendant, Bond. I should like to state for the record that I have submitted a Memorandum on behalf of the defendant, Bond Transportation, with respect to this motion taken by Bond and this was done in accordance with your Honor's request. It is a handwritten Memorandum. I would request that if the Court has no objection that this Memorandum be made a part of the record with respect to this motion.

The Court: We will do that.

Mr. Morley: Thank you, sir. It is the position, sir, of the defendant, Bond Transportation, that aside from the questions of negligence, liability with respect to Mr. McCaskill, and aside from the questions of injuries and damages, the two chief issues which confront the Court at this time with respect to Bond, are the issues of agency or employment so as to invoke the doctrine of Respondeat Superior and, secondly, as to whether any liability can at-

tach to Bond vicariously as a result of Mr. McCaskill's alleged tortious conduct due to the applicability of the I.C.C. regulations.

With respect, sir, to the doctrine of Respondeat Superior, it is the position of the defendant, Bond, that the Court must, as a matter of law, hold that the relationship that existed as between Bond and McCaskill, not at the time of the accident, but during the period of time that this relationship was one of independent contractor. At the precise time of the incident on January 22, 1965, it is respectfully submitted that as a matter of law no relationship existed as between McCaskill and Bond. The relationship that did exist terminated when Mr. McCaskill left the terminal at Woodbridge and proceeded in his own tractor to his home in Long Branch.

In the event that the Court is concerned with the relationship that existed as between McCaskill and Bond up until the time that he left the terminal, I respectfully submit that up to that time the relationship of independent contractor existed. As the basis for that, sir, we have the fact, number one, that Mr. McCaskill owned his own tractor, number two, that the agreement provided that McCaskill was to have a percentage of the profits with respect to each load that he carried and, number three, that all expenses relative to each trip were deducted from Mr. McCaskill's share of the profits, that no deductions were made by Bond for either Social Security or any withholding of Federal Income Tax, that frequently between assignments from Bond, McCaskill kept his tractor at his home in Long Branch, New Jersey.

I respectfully submit, sir, that on the basis of these facts, the relationship that existed as between McCaskill

and Bond during the general period of the happening of this accident was one of independent contractor.

At early common law until about 1935 and 1940, the only way liability could attach to a carrier with respect to a leased vehicle under the doctrine of Respondeat Superior. I, therefore, submit that under that doctrine, the Court would have to dismiss this case with respect to the defendant, Bond.

The second issue that confronts the Court, however, is as to whether or not the I.C.C. regulations have application in this case. A relevant section of the code is 49 U. S. Code, section 315. This part of the code has been fully explored in 43 Iowa Law Review, page 536. A copy of this Law Review has been made available to the Court and I believe the Court has found time to review the same. This is a 1958 Law Review article which I believe comprehensively covers the subject up until that time.

Essentially, what the Federal Congress has seen fit to do under this section of the statute is apply liability vicariously on a carrier for the tortious conduct of an independent contractor when this tortious conduct occurred during a period of interstate commerce which was occurring by reason of the franchise granted by the Federal Government to the carrier. I have no argument with that position. The position was adopted first in New Jersey or in New Jersey first by the case of *Trautman* v. *Higbie,* 10 N. J. 239 in 1952. The Supreme Court in that case declared that it was the position of the State of New Jersey that "Where one operates a motor vehicle under governmental franchise in the field controlled thereby, he assumes liability for acts done by others to whom he grants permission to use such franchise."

Appendix B

The defendant, Bond, in this case, sir, takes no issue with that position. This doctrine was again enunciated to be the law of the State of New Jersey in the case of *Honey* v. *Brown,* 22 N. J. 433, a 1956 decision.

I think it is interesting to note the decision of *Costello* v. *Smith,* 179 Federal 2nd, 715, a decision of the Second Circuit in 1950. That case stood specifically for the proposition that in a factual situation where a licensed I.C.C. franchise carrier had leased a vehicle fo the purpose of interstate transportation and had sent the lessor owner driver to a foreign state under the franchise of the carrier on a one trip operation, in other words, he was to go from one state to the foreign state and then supposedly the deal was consummated and the owner lessor driver was then supposedly cut off from any relationship with the carrier. Now, Costello said that was all right. Costello said that on a return trip if there was tortious conduct by the driver, the I.C.C. carrier would not be liable.

As a result of that decision and similar decisions throughout the United States, the I.C.C. rules and regulations were changed and the Courts subsequently came to the position of holding that they would not go along with these one trip deals, that if an I.C.C. carrier sent a lessor driver owner into a foreign jurisdiction, they were responsible for the return trip, for any tortious conduct of the driver on the return trip. Regardless of whether he was returning dead-head or what, they were responsible for the return trip.

Now, sir, it is respectfully submitted that the most recent decision of which I am aware in New Jersey which discusses this situation is the case of *Felbrant* v. *Able,* 80

N. J. Super. 587. I respectfully submit, sir, that the only thing the Felbrant case did on the facts of the case was to declare that the law of New Jersey was, as it is in sister states, that the Courts will not tolerate these one trip arrangements.

In the Felbrant case the owner lessor driver had come from Ohio to New Jersey under the I.C.C. franchise of the lessee carrier. When he deposited his load in Newark, New Jersey, he called the carrier in Pennsylvania. The carrier was based in Norristown. It was decided at that time that there was no load or work at Newark for the driver and that he, therefore, could return to Pennsylvania, dead-head with no load on his vehicle. It was further agreed that since the driver's wife was sick, he could return directly to his home, which was located in Pottstown, I believe some twenty miles distant from Norristown. Now, in the Felbrant case, we had a three year written lease as between the lessor and the lessee. The lessee was entitled to exclusive control of the vehicle during the period of the lease.

At the time of the accident in question, the driver lessor was actually engaged in an interstate operation. The accident happened in Elizabeth, New Jersey, on Route 1, I believe, when the driver was returning to Ohio, to his home base.

Now, the Court specifically said that there was twenty miles difference between where the driver was actually going to Pottstown and the home base which was Norristown. The Court said they felt this was a return to the home base.

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I, therefore, submit, sir, the only thing the Felbrant case has held on its facts is that a return trip in interstate commerce, the carrier franchise holder is liable for the tortious conduct of the driver.

Significant, sir, is the discussion by the Appellate Division through Judge Kilkenny of the Schmidbauer case, a case in Maryland, which I feel is exactly analogous to the factual situation now before the Court. If I recall the facts in the Schmidbauer case, the lessor-owner driver operating for an I.C.C. carrier in Baltimore and under that carrier's franchise had returned to Baltimore from a trip and had no immediate assignment at that time from his carrier. He, therefore, took his tractor with the decal on the tractor and went downtown to a movie, saw a movie, had something to eat and a few beers and then on his way back to the terminal had an accident.

The Maryland Court specifically held that at the time of this accident the vehicle was not engaged in interstate commerce, that there was no relationship at the time of the accident as between the carrier and the driver, that the I.C.C. regulations would have no applicability and therefore that no vicarious liability could attach to the I.C.C. carrier.

Now, sir, if this is not the law of New Jersey, the Appellate Division had opportunity to say no. But they did not. It is the position, sir, of Bond Transportation that the lengthy discussion of the Schmidbauer case by the Court in Felbrant gave tacit approval by the Appellate Division to the Schmidbauer case and the holding in the Schmidbauer case. This is a most recent decision, sir, of our Appellate Court and one which I respectfully submit this Court is bound by.

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I know of no decision, sir, in this state or a decision recognized by this state which has gone as far as to hold that liability can attach as to an I.C.C. franchise holder solely on the fact that at the time of an accident, with a non-owned vehicle, that the I.C.C. carrier's decal was on the truck. I respectfully submit, sir, that is all we have in this case. We have nothing else. There is no question but at the time this accident no relationship of employment existed as between the parties. There was no long term lease. Mr. McCaskill was not on any assignment for Bond Transportation. He was actually on his way home in his own tractor doing his own business. There was no return trip involved here. His work had been done for that day. He had no new assignment. Therefore, sir, this Court is being asked to attach liability vicariously to Bond solely because the decal was on the truck.

I respectfully submit, sir, the Courts of New Jersey have not gone that far and I, in addition, respectfully submit, sir, that I do not believe it is this Court's function to so expand the law. If the law is to be expanded in that direction, I respectfully submit, sir, it should be done by a Court and by a jurisdiction. I believe this Court is bound by the decision in Felbrant and of the tacit approval given by the Court in Felbrant to the Schmidbauer decision. On that basis, sir, I respectfully request a judgment of involuntary dismissal on behalf of the defendant, Bond.

The Court: Thank you.

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The Court: All right. How about fact or law, assuming I am not disposed to grant your motion? I am going to reserve on this motion until we get to the end of the whole case and, indeed, until we get a judgment, perhaps, but is it fact or is it law? Does Mellon say that if I conclude that this was interstate commerce and that he was within the contemplation and was verbally limited, must I charge liability as a matter of law or do we still ask the jury to factually determine whether we are within the scope of the engagement?

Mr. Morley: In my opinion, sir, this is solely a question of law. I, quite frankly, do not see how you can ask a jury how I.C.C. applies. I.C.C. applies or it does not apply.

The Court: How about Felbrant? How about Venuto? Venuto says in the clearest terms as to the trier of the facts. Felbrant, I don't know whether that is the end of the line with Felbrant, but the last sentence is: "The right of Service and Able inter se cannot be determined at this time and must await for a determination upon factual development at a trial."

Mr. Morley: That is any cause of action that exists, say, in this case as between McCaskill and Bond. There is no question, under the law Bond has an absolute right to indemnity as against McCaskill. That is what we are talking about. The I.C.C. carrier upon whom liability is vicariously applied because the statute—

The Court: No, I think you and I do not agree. That was a personal injury case where there was a Summary Judgment dismissing as to the trucking company and the good Judge Kilkenny said no, go back again for factual

determination. That seems to hint to me that it is for a trier of the facts. Venuto says it is.

Mr. Morley: Doesn't that speak, that last line that you read, in Felbrant again?

The Court: In Felbrant they simply, as I read it, they simply reversed the Judgment of Summary Judgment dismissing the trucking company. Do I read that correctly?

Mr. Morley: Yes, sir. Service is the carrier, is the I.C.C. licensed carrier?

The Court: Right.

Mr. Morley: Able is the owner-driver. Judge Kilkenny says: "The rights of Service and Able inter se cannot be determined at this time and must await for a determination upon factual development at a trial."

In this case, the way I read it, in this case it would be the rights as between Bond and the driver.

The Court: The first paragraph: "In this personal injury negligence action, the Law Division granted the motion for Summary Judgment of defendant, Service Transport Company, dismissing the action as to it, and denied defendant Able's motion for Summary Judgment, by which he sought an adjudication that Service, rather than he, was liable for the claims made by plaintiff. Plaintiff's claim against Able has not yet been tried." The Appellate Division reversed the Summary Judgment in favor of Service.

Does anybody else agree with me on that point as to what that case stands for?

Mr. Morley: They reversed it because they said that the Court to grant the motion was wrong on the law.

Mr. Joel: Your Honor, it seems to say that the driver made a motion against Service, saying: "Service, you are responsible instead of me if I was negligent," and the

Court concludes that that was wrong in the Summary Judgment on that basis and that must await the outcome of a factual development.

The Court: Anything else?

(No response.)

The Court: Has our good doctor arrived?

Mr. Newman: Yes, sir.

The Court: We will take a short recess. I will reserve on all motions.

* * *

The Court: Right. Over Mr. DeMaio's objection I have taken common law out. I think it would tend to confuse. I think it was not contested on that basis and the sole fact of using his truck to go home would not bespeak in this case common law liability. A compensation situation might have been handles differently.

Mr. Morley: All right. With respect to that issue of liability I should like to move for judgment of involuntary dismissal with respect to the defendant Bond as against both the plaintiffs, Cox and Murphy, on the grounds that on the facts established throughout this entire trial that is now before the Court that as a matter of law no liability can attach to Bond and the I.C.C. I renew, sir, at this time all of my arguments, citation, made at the conclusion of the plaintiff Cox's case and the authorities cited.

The Court: That was Schmidbauer and the Iowa Law Review?

Mr. Morley: Yes, and the New Jersey cases, Felbrant, which I feel is a very strong case in favor of the position that I take, the Higbie case. I cite *Higbie, Trautman* v. *Higbie* and *Honey* v. *Brown.* I also—

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The Court: Which was the last one?

Mr. Morley: *Honey* v. *Brown,* 22 N.J. 433. Those two cases, sir, all those two cases do, they adopt and impose upon the I.C.C. franchise carrier liability for the tortious conduct of an independent contractor-owner lessor which such owner lessor is engaged in interstate commerce. Those were the foundation cases making this the law in New Jersey.

The Court: And I suppose you also argue that if not granted as a matter of law, you saw as a matter of fact, reasonable men could not differ in holding that as a matter of fact—you say as a matter of law you are not liable?

Mr. Morley: Yes, sir.

The Court: So that we fully articulate your position, you say, furthermore, as a matter of face, reasonable men could not differ in holding that at the time this accident happened Mr. McCaskill was in the contemplation of your verbal lease?

Mr. Morley: I would say that is so, sir, but I do not want to compromise myself by saying that is solely a question of law to be decided by this Court. I do also want to make a couple of other points.

The Court has mentioned several times during the course of this trial the fact that the agreement as between the parties, as between McCaskill and Bond, was not in writing, and I respectfully submit that the Court has missed the significance of it not being in writing. It was not in writing for a very specific purpose. Because the agreement as contemplated between the parties dealt with an intra-state operation, not an interstate operation. If this be true, there is no requirement for the agreement to be in writing.

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Now, I would call the Court's attention to the case of *Kissell* v. *Motor Age Transit Lines,* a Pennsylvania decision, 357 Pennsylvania, 204, Supreme Court of Pennsylvania, 1947, where the Court stated—

The Court: Could I have the citation again?

Mr. Morley: Surely: 357 Pennsylvania, 204, 53 Atlantic 2nd, 593.

The Court: Atlantic 2nd, 593?

Mr. Morley: Yes, sir.

The Court: All right.

Mr. Morley: The Court stated: "If specified conduct, in one view, may be construed to be lawful, and in another, to be unlawful, the lawful construction should be adopted."

Now, sir, if the agreement as between Bond and McCaskill contemplated that it came within the scope of I.C.C., it was illegal, if that was not in writing.

The Court: I quote from the case of *Leotta* v. *Plessinger,* the majority opinion: "If the jury were to conclude that Riggs wilfully failed to comply, it is apparent that, under the regulations and in accord with its policy, Riggs as a matter of law would be in possession and control and, therefore, must assume responsibility."

Those words are emphasized. To me it would be against public policy to permit a man to make an arrangement which is in fact a lease for a term in excess of thirty days, and that is fairly inferable here, and say "I wash my hands of it because I chose not to reduce it to writing."

Mr. Morley: I would agree if it dealt with interstate commerce, but if an agreement is made between a carrier and a lease holder, which agreement encompasses only intrastate activity, there is no need for a written lease.

The Court: Well, I think the I.C.C. regulations require it, and if these men entered into an oral agreement, in other words, I don't see how they can escape the interstate behavior, the so-called Saldutti Brooklyn to Paulsboro operation. To use his own employees, another man's truck, pay him and then use somebody else's license, to me, I have a great deal of difficulty in understanding our Appellate Courts saying these people only contemplated working within the state. As I say, the responsibility is on Bond here, not McCaskill, to reduce things to writing.

All right.

Mr. Morley: With regard to that, do I understand the Court that with regard to that trip it is the Court's feeling that Bond would be responsible and not Saldutti?

The Court: I am not going to answer that.

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The Court: Well, I told them, Mr. Morley, I think, to consider all of the facts and circumstances. They may consider these among others and that, and I feel that was important, that I told them that I was not making any factual decision myself. They must first find out whether they accepted these to be a fact and if so they may consider them in determining its over-all relationship within the scope of the activity. All right.

Mr. Morley: With respect to the decal, your Honor informed the jury, instructed the jury, with respect to considering the decal. Your Honor, however, did not, with respect to the decal, make any comment as to whether at the time of its alleged use the vehicle in question was being used in interstate commerce. Of course, this goes to the nub of the case and it is the position of the defendant Bond that for the use of the decal to have any relevance

in this case, the McCaskill vehicle at the time of the accident had to be involved in interstate commerce.

The Court: Well, I need not comment on that. We have been through that many times, both on motions and in earlier comments.

Mr. Morley: Your Honor specifically charged, and this, of course, is where Bond completely disagrees with the Court, but at the time of the accident it was not necessary for the vehicle to actually have been involved in interstate commerce.

The Court: I agree with you that this was the nub of the case, and as I said several days ago, the gauge was down on the point. As I read these authorities, that is not required.

Mr. Parsons: For the same reasons as expressed by Mr. Morley, I would except to that portion of your Honor's charge instructing the jury to return money damages as to all three plaintiffs, including plaintiff Erickson, notwithstanding a finding of no negligence by McCaskill.

The Court: All right, thank you.

(After conference in chambers.)

The Court: Let the record reflect that a week ago Friday, May the 5th, a Jury, pursuant to Rule 4:50-1, returned a special verdict, and before the entering of a general verdict and judgment, we withheld further argument until today's date.

Let the record also show that Mr. Joel—he just came in the Courtroom.

Mr. Joel, Yes, Your Honor.

The Court: Let the record also show that Theodore Parsons, Jr., on behalf of the Defendant, McCaskill, does not appear.

Mr. Morley: If Your Honor please, pursuant to Your Honor's instructions, a brief was submitted to the Court, I believe, on Friday last on behalf of the Defendant, Bond Transportation, and if the Court has no objection and Counsel have no objection, I should like to have that brief physically made part of the record.

The Court: All right. That will be done.

(Brief annexed to the end of transcript.)

Mr. Morley: Thank you, sir.

In view of that fact, sir, I will not belabor the situation or take the Court's time to any great extent. I would like to say, as I see it, the sole issue now before the Court is whether or not the Defendant, Bond Transportation, is liable or not liable as a matter of law with respect to the tortious conduct of Mr. McCaskill on the evening of the accident.

I would respectfully submit to the Court, sir, that whatever the relationship was that existed as between Bond Transportation and McCaskill on January 22nd, 1965, the date of the accident, that that relationship terminated as a matter of law when McCaskill left the Bond terminal in Woodbridge, and that that fact and that determination alone should be dispositive of the liability or the alleged liability of Bond Transportation. Even if that relationship had not terminated and that when McCaskill was going home on the evening of the accident, the relationship of independent contractor still continued to exist, that fact alone is totally insufficient as a matter of law to impose any liability on Bond pursuant to the provisions of the Interstate Commerce Commission.

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I respectfully submit, sir, that the essential facts upon which the Court should make this determination are not in issue or dispute in this case. There's no question that McCaskill received his assignments as an independent contractor or on a day-to-day basis.

The Court: May I interrupt you?

Mr. Morley: Yes, sir.

The Court: Because that's the one point that I read over the weekend from your memo, and which you argue and have argued, but both parties more than once in their testimony rather negated that thought in that they said he was hired for the "cold season."

Now, it's true that he got his assignments, or the Jury can find he got his assignments, on a day-to-day basis, but the history of his engagements up to the time of the accident, I think it began in November—

Mr. Morley: February, 1964.

The Court: Then there was an interruption, but at the time immediately preceding this, there had been a regular course of his going in each day and getting assignments or having one telephoned to him.

Mr. Morley: I believe it was from November 30th.

The Court: This happened on January 22nd.

Now, while you say he was on a day-to-day basis, which would bring you within that one case prescribed against this kind of arrangement, either factually or as a matter of law, and since they both said it was the "cold season," could not a Jury find, as a matter of fact, or the Court find, as a matter of law, that this was not the relationship, that it was one of the 30-day arrangements?

I mean, I'm interrupting because you have said throughout, and you might be right, that this was a day-to-day

thing, but I have that in the back of my head that the parties contemplated more than a day-to-day arrangement.

Mr. Morley: I believe the parties contemplated if work was available after all of the Union employees had received their assignments, that McCaskill would get the work, but that determination would have to be made on a day-to-day basis, because I don't believe that this Court, or any Court, can avoid the point that it was admitted in this case and agreed that McCaskill would not get assignments either until late in the evening or early in the morning when there was a telephone conversation between him and the dispatcher. It's the position of Bond Transportation that during that period of time no relationship existed as between Bond and McCaskill.

I don't believe, sir, there is any dispute whatsoever that the last transaction, which involved Mr. McCaskill as an independent contractor or for Bond Transportation, concerned itself solely with an Intrastate shipment, I believe it was either three or four loads back and forth between Whippany and Newark on the day of the accident. Also that that haul had been completed prior to the—that that had been completed, that haulage had been completed prior to the actual moment when the accident happened, and that McCaskill frequently took his tractor home with him in the evening, and that he had a right to do this, and also that Bond had no right to preclude him from taking his tractor home.

There's no testimony, sir, in this case, and I submit that the record is completely barren of any proof that McCaskill had any assignment or would have any assignments subsequent to the date of the accident. There's

also evidence in the case that during the period from when the relationship first commenced between McCaskill and Bond in February of 1964, up until the date of the accident, that McCaskill had in fact hauled on many occasions for other carriers. I also submit, sir, that there is no question in this case that McCaskill never hauled for Bond any haulage in Interstate Commerce.

Now, as I am sure we all recall, the only time that McCaskill, while hauling for Bond, went out of the state of New Jersey, was the trip from Brooklyn to Paulsboro, I believe it was December 7th, 1964, sometime in December. The testimony is undisputed in this case that that haul was made under the I.C.C. franchise of another carrier, merely there was a dispute as to whether Bond's decal was on McCaskill's truck during the course of this one Interstate trip. Your Honor, that fact alone would not make the trip an Interstate venture under Bond's I.C.C. franchise.

Now, sir, if this Court intends to attach any significance to the alleged fact that at the time of this accident, Bond's I.C.C. decal was on the McCaskill vehicle, I would respectively submit there has been no factual finding on that point. It was disputed in this case. McCaskill said that this was Bond's I.C.C. decal. The Vice-President of Bond Transportation, Mr. Harrison, said he had never seen this decal, and this was not Bond's I.C.C. decal.

We submit, sir, that whether or not it was Bond's I.C.C. decal is insignificant in this case. That at the very best, McCaskill was involved in an Intrastate relationship between himself and Bond Transportation, and there is no authority that I can find which imposes liability on an Interstate Franchise carrier for the tortious conduct of its

independent contractor who was engaged solely in an Intrastate venture.

As I'm sure the Court has noted in the brief that I have submitted, I pointed out to the Court that it is our position that such an imposition of liability on an Interstate Franchise carrier would be a violation of Article I, Section 8 of the United States Constitution, and would further be violative of the Fourteenth Amendment to the United States Constitution. It would fail to give equal protection of the laws to an Interstate Commerce carrier compared to an Intrastate carrier, and further, it would be an undue and unwarranted burden and restriction on Interstate Commerce, and Federally unconstitutional.

The Court: Thank you, Mr. Morley.

* * *

The Defendant argues that since there was no written agreement between the parties, since the arrangement was, shall we say, "haphazard at best," on a day-to-day basis, and that McCaskill had no specific assignment to come back, since he had not been that day or at the time of the accident engaged in Interstate activity, since he was on his way home, not in furtherance of any activity of the Defendant, Bond, as a matter of law, cannot be responsible for the negligent act of McCaskill.

The I.C.C. regulations have specifically required certain things to be done by carriers when they have these arrangements. In this case, little if none of the requirements were met. There was no written lease, no lease was kept in the cab that is required, when possession was yielded, if it was on the night in question, there was no demand by Bond that the decal be returned, and a receipt given for it.

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The Jury could, of course, have found, indeed it was hard for them not to have found, that the decal was on the truck, because photographs showed it I'd say rather clearly, some weren't so clear, while it was still on the scene.

We used the test of responsibility as set forth in the Restatement, and then in addition to that, I gave several factors and ingredients that the Jury might consider in finding out whether the parties contemplated McCaskill's voyage on the night in question, and whether that was within the Restatement test. I did not limit them by the ingredients I gave, but said they should consider all of the facts and circumstances in the case.

It seems to me that the spirit of both the I.C.C. regulations, and the many authorities we have discussed at earlier arguments, we need not go into them at this time, it seems that the spirit of those both decisional authorities and the I.C.C. requirements themselves are designed to put responsibility on Interstate carriers, licensed Interstate carriers, and to avoid the very kind of accident we had here.

The Felbrant case, Judge Kilkenny's case, I guess that was in 80 Superior, intimated that there was a factual question to be decided as to the relationship between the parties at the time of the accident, and for that reason I gave it to the Jury, and they made a finding that the activity of McCaskill was within Bond's activities.

I indicated during the course of the trial, and I still feel, that I would be disposed to make that Judgment, as a matter of law, on the appropriate authorities. However, since there was a Jury finding in that regard, I need not make that Judgment.

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I'm satisfied that the Jury could have found, and did find, and I would find, that the activities of Bond at the time was within the prescription of both the I.C.C. requirements, and also the Restatement liability. I feel that any other finding would permit or tolerate an avoidance of the spirit of both the I.C.C. requirements, and also the decisions which we discussed before.

Accordingly, on Cox's complaint, the first count, Judgment will be entered as of today's date in the amount of $100,000.00. On the second count, $375.00. On Mr. Murphy's—Michael Murphy's complaint for personal injuries, $4,000.00. And for Henry G. Erickson's damages for personal injuries in the amount of $7,500.00.

Since the Judgment is entered as of today's date, we will not await any other motions you may have addressed to the weight of the evidence and the like.

Thank you all.

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OPINION OF APPELLATE DIVISION APPEAL
(99 N. J. SUPER. 335)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

EDWARD A. COX,

Plaintiff-Respondent,

v.

BOND TRANSPORTATION, INC.,

Defendant-Appellant,

and

MANUEL MCCASKILL,

Defendant-Respondent.

MICHAEL F. MURPHY, by his guardian *ad litem*,
IRIS F. MURPHY and DENNIS MURPHY,

Plaintiffs-Respondents,

v.

BOND TRANSPORTATION, INC., a corporation of the
State of New Jersey,

Defendant-Appellant,

and

MANUEL MCCASKILL,

Defendant-Respondent.

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Argued January 29, 1968—Decided February 23, 1968.

SYNOPSIS

Actions arising out of multi-vehicle collision was brought against motor carrier and owner of truck-tractor leased to carrier. The Superior Court, Law Division, rendered judgment for plaintiffs. Motor carrier appealed. The Superior Court, Appellate Division, Leonard, J.A.D., held that under record showing that owner was operating his tractor for carrier in intrastate commerce on day of accident and at all other times, save for one occasion on which he was operating under franchise of another carrier, owner was not operating under carrier's Interstate Commerce Commission franchise and thus carrier was not vicariously liable for owner's alleged negligence in operation of his tractor.

Judgments against carrier reversed and matter remanded with directions.

Before Judges SULLIVAN, FOLEY and LEONARD.

Mr. Carroll A. Morley argued the cause for appellant (*Messrs. Lamb, Blake, Hutchinson & Dunne,* attorneys).

Mr. Vincent C. DeMaio argued the cause for respondents (*Mr. Kenneth E. Joel,* attorney for respondents, Michael F. Murphy and Dennis Murphy).

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The opinion of the court was delivered by

LEONARD, J.A.D. In these consolidated motor vehicle negligence cases defendant Bond Transportation, Inc. (Bond) appeals from those portions of a final judgment entered against it, after jury trial, for $4,000 and costs in favor of plaintiff Michael Murphy by his guardian *ad litem* and for $100,375 and costs in favor of plaintiff Edward A. Cox. Bond also appeals from the trial judge's denial of its motion for judgment *n.o.v.* or for a new trial.

At all relevant times Bond was a carrier franchised by the Interstate Commerce Commission (I.C.C.) to engage in trucking one-way from New Jersey to New York. It's certification number was I.C.C. 15727. At the same time, defendant Manuel McCaskill was the owner of a tractor.

In February 1964 Bond entered into an oral agreement with McCaskill whereby the latter leased his tractor to Bond and agreed to operate it in Bond's trucking business "as long as there was work to be had." Pursuant thereto McCaskill hauled oil sporadically for Bond until November 30, 1964 and on a fairly steady basis from December 1964 to January 22, 1965, the date of the accident here involved.

During all that time every trip but one that McCaskill made for Bond took place entirely within the confines of the State of New Jersey. Usually, McCaskill would leave Bond's terminal in Woodbridge and proceed to Paragon Oil in Newark. After Bond's trailer (tank car) was loaded with oil he would proceed to his destination where he would discharge his load. Thereupon, he would return to Woodbridge and unload his tractor from the trailer.

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The one interstate trip was made on December 12, 1964 when McCaskill carried a shipment from Brooklyn to Paulsboro, New Jersey. However, since Bond was not franchised by the I.C.C. to make this haul, the journey was made, pursuant to arrangements made by Bond, under the permit of a lawfully franchised carrier, Saldutti.

On January 22, 1965 McCaskill made five intrastate trips from Newark to Whippany, New Jersey. When he concluded his work he returned to Bond's terminal in Woodbridge and unhooked the trailer from his tractor. He then proceeded to drive his tractor to his home in Long Branch. On the way, while traveling south on Highway 35, he was in a multi-vehicle collision, involving automobiles then being driven north on said highway by plaintiffs Cox and Michael Murphy.

Thereafter plaintiffs brought actions for personal injury, property damage and consequential damages. The suits were consolidated for trial. Plaintiffs alleged that Bond was vicariously liable for McCaskill's purportedly negligent conduct either under a common law master-servant *respondeat superior* theory or by virtue of Bond's special responsibility as an I.C.C. carrier for the operations of vehicles leased by it that were used under Bond's franchise. At the conclusion of all the testimony the trial judge granted Bond's motion to dismiss the claim based upon *respondeat superior*. No cross-appeal has been taken from that ruling.

However, the court denied Bond's motion for a judgment of dismissal based upon the absence of a showing that McCaskill was working under Bond's I.C.C. franchise in interstate Commerce either in general or at the time of the accident. Instead, the court in its charge, and by

a specific interrogatory, submitted to the jury the issue of Bond's vicarious liability.

The jury found McCaskill negligent, plaintiffs free from contributory negligence, and the requisite relationship for imposing vicarious liability upon Bond present. It awarded damages of $100,375 to Cox and $4,000 to Murphy against both bond and McCaskill. The latter has not appealed.

On this appeal Bond contends that as a matter of law, vicarious liability should not have been imposed upon it because McCaskill did not operate either in general, or specifically at the time of the accident, in interstate commerce under Bond's I.C.C. permit.

New Jersey does not require intrastate carriers to obtain a franchise. McCaskill indisputably was an independent contractor. Thus, unless he was operating his tractor for Bond in interstate commerce, he was not operating the vehicle "under a governmental franchise in the field controlled thereby." *Cf. Honey* v. *Brown,* 22 N. J. 433, 439 (1956); *Trautman* v. *Higbie,* 10 N. J. 239, 244 (1952); *Felbrant* v. *Able,* 80 N. J. Super. 587, 594 (App. Div. 1963). See also *Restatement, Torts* 2d, § 428, p. 420 (1965), which applies liability only where the "activity * * * can be lawfully carried on *only* under a franchise granted by public authority * * *." (Emphasis added).

[1] The record clearly indicates without contradiction that on the day of the accident and at all other times save for the one exception previously mentioned, McCaskill was operating his tractor for Bond in intrastate commerce. Thus, we hold that he was not operating under Bond's I.C.C. franchise and that Bond as a matter of law

is not vicariously liable for McCaskill's negligence in the operation of his tractor.

The fact that on one occasion, December 12, 1964, McCaskill drove from Brooklyn to Paulsboro, does not alter the above conclusion. Bond was not franchised to make this trip and it was made under the permit of another lawfully franchised carrier.

[2] Nor does the fact that the tractor, at the time of the accident, had a sign thereon reading, "Bond Trans. ICC 15725. Woodbridge, N. J." change the character of McCaskill's relationship with Bond. It is to be noted that Bond's I.C.C. franchise number was 15727 and not 15725. Further, this sign was admittedly hand-written by McCaskill and was not a permanent I.C.C. decal sign issued by Bond. A tractor used in this State must display the name and residence of the owner, lessee or lessor of the vehicle. N.J.S.A. 39:4-46. The mere addition of an incorrect I.C.C. number to the already required information is not enough to warrant the application of the *Honey, Trautman* and *Felbrant* rule under the totality of the undisputed facts here present.

In light of all of the above, we conclude that the trial court erred in not granting Bond's motion for a judgment of dismissal on the ground that as a matter of law vicarious liability should not have been imposed upon it because of McCaskill's negligence.

By reason of the foregoing conclusion it is not necessary to consider Bond's other contentions.

The judgments against Bond are reversed and the matter is remanded to the trial court with directions to enter judgments against plaintiffs and in favor of Bond. (Plaintiffs' judgments against McCaskill are not here involved and consequently are not disturbed.) No costs.

Appendix B

PETITION FOR CERTIFICATION TO REVIEW REVERSAL OF APPELLATE DIVISION, GRANTED (51 N. J. 571)

EDWARD A. COX,

Plaintiff-Petitioner,

v.

BOND TRANSPORTATION, INC.,

Defendant-Respondent.

MICHAEL F. MURPHY, by his guardian *ad litem, et al.*,

Plaintiffs-Petitioners,

v.

BOND TRANSPORTATION, INC.,

Defendant-Respondent.

On petition for certification to Appellate Division, Superior Court.

See same case below: 99 N. J. Super. 335.

Mr. Vincent C. DeMaio and *Mr. Kenneth E. Joel* for the petitioners.

Messrs. Lamb, Blake, Hutchinson & Dunne and *Mr. Carroll A. Morley* for the respondent.

May 14, 1968. Granted.

Appendix B

OPINION OF REVERSAL OF SUPREME COURT OF NEW JERSEY
(53 N. J. 186)

EDWARD A. COX,

Plaintiff-Appellant,

v.

BOND TRANSPORTATION, INC.,

Defendant-Respondent.

MICHAEL F. MURPHY, by his Guardian *Ad Litem*,
IRIS F. MURPHY and DENNIS MURPHY,

Plaintiffs-Appellants,

v.

BOND TRANSPORTATION, INC., a corporation of the
State of New Jersey,

Defendant-Respondent.

Argued November 4, 1968—Decided January 27, 1969.

SYNOPSIS

Consolidated motor vehicle negligence actions. The Superior Court, Law Division, rendered judgment for plaintiffs, and defendant motor carrier appealed. The Superior Court, Appellate Division, 99 N. J. Super. 335, 240 A. 2d 14, reversed and remanded for entry of judgment

in favor of carrier, and certification was granted. The Supreme Court, Francis, J., held that evidence sustained jury finding that, at time of accident involving plaintiffs' automobiles and tractor, which had been orally leased to certificated interstate carrier, which bore decal or sign showing carrier's name and I.C.C. authorization number, and which was being driven by its owner on way home after finishing daily assignments, owner was operating tractor in carrying on activity of carrier so as to render carrier responsible, under I.C.C. regulations, for owner's negligent operation.

Judgment of Appellate Division reversed; judgments of trial court in favor of plaintiffs reinstated.

Mr. Vincent C. DeMaio argued the cause for appellants (*Mr. Vincent C. DeMaio* attorney for appellant Edward A. Cox; *Mr. Kenneth E. Joel* attorney for appellants Michael F. Murphy and Dennis Murphy).

Mr. Carroll A. Morley argued the cause for respondent (*Mr. Carroll A. Morley,* of counsel; *Messrs. Lamb, Blake, Hutchinson & Dunne,* attorneys).

The opinion of the court was delivered by

Francis, J. In the consolidated motor vehicle negligence actions which are the subject of this appeal, plaintiffs Cox and Murphy recovered substantial personal injury verdicts against defendants Bond Transportation, Inc. and Manuel McCaskill. Bond's subsequent appeal to the Appellate Division resulted in a reversal and a remand for entry of judgments in its favor. 90 N. J. Super. 335 (App. Div. 1968). *McCaskill* did not appeal. We granted certification on plaintiffs' petition. 51 N. J. 571 (1968).

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McCaskill was the owner and operator of the tractor involved in the collision which resulted in these damage actions. The basic issue is whether by reason of the Interstate Commerce Commission regulations defendant Bond Transportation, Inc., as a certificated interstate carrier, should be deemed to have had such possession and control over the tractor at the time of the accident as to make it liable for McCaskill's negligent operation. The trial court held that under the evidence adduced the issue was a factual one for jury determination.

The situation out of which these claims arose is unusual. For many years prior to January 22, 1965, defendant Bond had been engaged in the intrastate and interstate transportation of oil. Its principal place of business was in Woodbridge, New Jersey. It held an Interstate Commerce Commission Franchise as an interstate carrier, the certificate number being I.C.C. 15727. Bond had a number of tractors and tank trailers of its own which were used in the ordinary operation of its business; all had the company name and I.C.C. number painted on them. In the busy season, *i.e.,* in advance of and during the cold weather, additional tractors were hired from their owners to assist in the transportation of oil by hauling Bond tank trailers. Such owners usually drove the vehicles personally. They are described in the record as lease-operators (of which more later). The company furnished all of them with a metal decal bearing the Bond name and I.C.C. number which decal was fastened to the side of the tractor. According to Daniel Harrison, Vice-President and part-owner of Bond, the Interstate Commerce Commission regulations required the name of the lessee and the decal to be placed on the rented tractors. Five to seven such lease-

operators had been so engaged by Bond for a number of years and were working in that capacity at the time of the accident involved here. These operators delivered their loads during the day to the places designated by Bond's dispatcher. On returning to the Bond yard or terminal at the end of the day's work, they would be given their assignment for the next day by the dispatcher or they would receive it from him by telephone later in the evening.

Defendant Manuel McCaskill was the owner of a tractor of the type hired by Bond. By arrangement with Harrison he was engaged in February 1964 as a lease-operator under what was called an oral lease. McCaskill described himself as a seasonal operator for Bond. He testified that during his first discussion with Harrison he was told that if he "worked out" he would be kept busy during the season. He said also that in that period he could not haul for anyone else without the company's consent. During the offseason he could and did seek other work. It is plain from his statements that (1) he considered Bond to have had first call in season on the use of his tractor and his services as its driver, and (2) under the oral lease his tractor was to be available for interstate as well as intrastate transportation. Under the agreement he was to receive 65% of the charges made by Bond for each of his hauls. This was the same rate of pay as all other lease-operators received.

After February 1964, McCaskill worked sporadically for Bond until November 1964. In the summer of 1964, except for a few occasions in July, when Bond called him, he sought work from other companies. From December 7 until January 22, 1965 he hauled fairly regularly and exclusively for Bond.

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McCaskill lived in Long Branch, N. J., and the Bond terminal was at Woodbridge, N. J. His work day began at the terminal at 4:00 or 5:00 A.M., and it was necessary for him to be there at that time. Like the other lease-operators, on return to the terminal at the end of the day he would receive the next morning's assignment if it had been decided upon at that time; if not, it would be given to him over the telephone later in the evening by the dispatcher. This meant, of course, that McCaskill would hold himself and his tractor available to respond to the assignment by appearing at the terminal between 4:00 and 5:00 A.M. the following morning. Inferably also, on his version of the agreement with Bond, he could not seek other work until after he received the evening message that his services would not be needed the next day. In order to facilitate the operation he would either leave his tractor at the terminal at the end of the day, sometimes attached to Bond's trailer, or he would detach the trailer and drive the tractor to his home and back to the terminal in the morning. At one point he testified he drove the tractor home and back most of the time; at another point he said he generally left the tractor at the yard and used a light pick-up truck, also owned by him, for the trip to and from the yard. Harrison's statements on this subject were somewhat at variance. He said that most of the time McCaskill detached the trailer at the end of the day and drove the tractor home and back again in the morning.

Harrison described McCaskill as a lease-operator and their relationship as arising out of an oral lease. He regarded the connection between them as a loose one, a seasonal one, on a day-to-day basis whenever Bond needed McCaskill's services. He said that the latter was free to

work for anyone else at any time and was under no obligation to hold himself available for Bond.

The credibility of Harrison's testimony on some aspects of the arrangement between his company and McCaskill was open to serious question. Obviously the jury decided the issue against him. Harrison was called first as a plaintiff's witness and his direct, cross and redirect examination covers 48 pages of the record; he was called later as a defense witness and the direct, cross and up to the last question on redirect examination takes up 47 pages of the record. This last question, a most leading one, put by his company's attorney was:

> "Q. Isn't that also a fact sir, that when you, Mr. Harrison, on behalf of Bond Transportation hired Mr. McCaskill on this leased operation, that the agreement was that he was to haul strictly intrastate, within the state of New Jersey when he hauled for Bond. Is that correct?
>
> A. Yes."

It is the fact that with the exception of one interstate movement all of McCaskill's trucking for Bond was intrastate. But it does not follow therefrom that his lease-operator agreement was limited to intrastate work. There is substantial evidence to show that his engagement was an unqualified one—to assist generally in the transportation operations of Bond without any specification or restrictions respecting either interstate or intrastate operation. Moreover, the circumstances reveal that Bond expressly qualified McCaskill to operate his tractor as an interstate carrier. When McCaskill first became a lease-operator of Bond, according to one portion of Harrison's testimony

the company gave him a metal decal to be screwed to the side of his tractor. It contained the company name and I.C.C. number. Its size does not appear. Harrison said the decal was given because the Interstate Commerce Commission regulations required it, and that thereafter it was always on the tractor. He said further that such a decal or sign was not needed for intrastate carriage; it was needed only to qualify a vehicle for interstate transportation.

McCaskill agreed that it was necessary to have a legend on the door of his tractor showing the name of the company for which he was operating and its I.C.C. authorization number, and further, that Bond required him to have it there. He said, however, that no metal decal was available for his truck at the time. Consequently the employee in charge of Bond's garage gave him a cardboard and a company stencil to prepare his own sign. He did so and placed it on his tractor. It read: "Bond Transportation, Woodbridge, N. J., I.C.C. 15727" in letters of substantial size. It remained attached at all times thereafter, even on the occasions during the winter season when he drove the tractor between the terminal and his home. Harrison knew this and never told him to remove it. There is no doubt that it was there when the accident in question happened. Moreover, the tractor was taken back to the Bond Terminal from the scene of the accident and according to McCaskill, he used it in Bond's hauling work thereafter.

We do not regard of major significance the conflict in the testimony of McCaskill and Harrison as to whether the tractor at all times bore the Bond metal decal as asserted by Harrison, or the cardboard sign described by

McCaskill, or whether it bore both decal and sign, as the jury could have found. The legal effect of decal and sign is substantially the same.

Harrison testified also that his company subjected the equipment of the lease-operators to the same safety inspection rule as was applied to its own equipment. In addition, he considered that the lease-operators, such as McCaskill, were subject to the same company supervision while they were on the road as were the regular employee-operators.

On January 22, 1965, at the customary early morning hour, McCaskill drove from his Long Branch home to the Woodbridge terminal in his light pick-up truck. His tractor bearing the Bond sign had been left there at the end of the previous day's work. He hooked the tractor to the tank-trailer and transported four or five loads of oil from the Paragon Oil Company in Newark, N. J. to a Bond customer in Whippany, N. J. On completion of his assignment he returned to the terminal at Woodbridge. His pick-up truck would not start so he decided to leave it there and drive home and back to the terminal in the tractor. No one suggests that his seasonal work for Bond had ended, or that the decal was removed or ordered removed from the tractor before McCaskill drove out of the yard. While moving south on Route 35 he became involved in a collision with vehicles of the plaintiffs Cox and Murphy.

Subsequently Cox and Murphy brought this action against McCaskill and Bond Transportation, Inc. The theory of the action was twofold: (1) Bond was liable for McCaskill's negligence under the common-law *respondeat superior* doctrine; (2) by reason of the Interstate Com-

merce Commission regulations McCaskill, as a lease-operator, was operating his tractor within Bond's franchise at the time of the accident and thus Bond was vicariously liable for McCaskill's negligence. The trial judge held that McCaskill was an independent contractor, that he was driving as such when the accident happened, and therefore common law principles of *respondeat superior* were not applicable. Consequently he granted the company's motion to dismiss that claim. The judge concluded, however, that a jury question existed as to whether Bond was vicariously liable for McCaskill's negligence because he was a lease-operator whose tractor bore either a metal decal or a sign indicating that he was operating it on the public highway under Bond's I.C.C. franchise and within the activity authorized by it. The jury was charged generally with respect to the Interstate Commerce Commission regulations and the nature of the relationship created thereby between the franchised carrier and a lease-operator. At the conclusion of the charge the following special interrogatory on the subject was submitted to them to be answered at the conclusion of their deliberations:

> "Do you find that at the time of the accident Manuel McCaskill was operating his tractor in carrying on the activity of Bond Transportation Company?"

On returning verdicts for the plaintiffs, the jury answered the question in the affirmative. As indicated hereafter this answer signified a finding by the jury that McCaskill had been engaged to operate in intrastate and interstate commerce, had been qualified by Bond to so operate, did in fact drive in interstate commerce, and at the time of

the accident in driving the tractor home he was engaging in an activity which was at least in part for the benefit of Bond. The resulting judgments against Bond were reversed on appeal on the ground that McCaskill was not operating his tractor *in interstate commerce* at the time of the accident and therefore Bond could not be deemed to be in possession and control of it within the meaning of the Interstate Commerce Commission regulations. Such regulations not being applicable, the Appellate Division declared McCaskill's status was that of an independent contractor for whose conduct Bond could not be held liable vicariously.

I

In 1935 Congress enacted the Motor Carrier Act, now Part II of the Interstate Commerce Act, 49 U.S.C. §301 *et seq.* (1964). Under its authorization the Interstate Commerce Commission adopted comprehensive rules regulating the conduct and operation of the motor truck industry in interstate commerce. Many of them related to the safety of the equipment to be used on the highways and to the physical condition of the operators driving it. As a result of these regulations a substantial number of certificated carriers began to use equipment owned by non-franchised truckers. This was accomplished by a variety of leases and other arrangements, written and oral (frequently for a one-way trip or a single round trip) under which such owner-operator truckers carried on the operations of the authorized carrier. The use of equipment of non-franchised owner-operators was not unlawful under the Act or the regulations. In contracting with such persons the carriers took care to constitute them independent contractors. In this way the franchised carriers were able to avoid the Commission safety regulations that

had been prescribed for equipment and drivers in order to protect the public. Moreover, many of the noncertificated owner-operators were itinerant truckers, known as "gypsies," who had poor equipment and little financial capacity. These satellite practices, which are discussed at length in *American Trucking Assos.* v. *United States,* 344 U. S. 298, 73 S. Ct. 307, 97 L. Ed. 337 (1953) and *Christian* v. *United States,* 152 F. Supp. 561 (D. Md. 1957), came under investigation by the Interstate Commerce Commission, and in 1951 and 1956 regulations designed to remedy the evil, particularly the trip-leasing, were adopted pursuant to 49 U.S.C. §304(e).

Section 304(e) authorized the Commission to prescribe regulations "with respect to the use by motor carriers (under leases, contracts or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property * * *." Specifically the agency was given authority to adopt regulations

> "(1) * * * requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and
>
> (2) such other *regulations* as may be reasonably necessary in order *to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in ac-*

> *cordance with applicable law and regulations,* as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment." (Emphasis added.)

Pursuant to this authority the Commission adopted regulations governing the leasing of owner-driven tractors for use in the business of franchised carriers engaged in interstate transportation. 49 C.F.R. 1057.4 (1968) provides that authorized carriers may perform authorized transportation with equipment owned by non-franchised truckers only by lease, contract or other arrangement in writing. When the equipment is to be operated by the owner or his employee for the authorized carrier, the lease, or other writing, shall specify its duration which "shall not be less than 30 days" (with certain exceptions not material here). Section 1057.4(a)(3). It must provide "for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration" of the lease. Section 1057.4(a)(4). It must specify the compensation to be paid by the lessee, and fix the inception and termination dates of the use of the equipment. A copy of the lease or a certified statement prepared by the carrier describing it, is required to be carried on the equipment. Section 1057.4(a)(7)(d)(2). Additional rules direct that when possession of the equipment passes to the carrier a receipt therefor stating the date and time of day the possession begins shall be

given to the owner, and on relinquishment of possession a similar receipt shall be obtained by the carrier from the owner stating the date and the hours of the retaking of possession. Section 1057.4(a)(7)(b). Before taking possession the carrier is under a duty to inspect or have the leased equipment inspected by a competent person to insure that it satisfies the safety requirements of the Commission, and a detailed report on a form specified must be executed and filed. Section 1057.4(a)(7)(c).

Another subsection of the rule of considerable significance in the present case deals with the matter of indentification of the leased equipment. Section (7)(d) orders the carrier acquiring the use of equipment under Section 1057 to identify itself properly and correctly on the equipment as the operating carrier during the period of the lease. It says also that if a removable device is used for the purpose, the device shall be on durable material such as wood, plastic, or metal, and shall bear a serial number in the authorized carrier's own series. Subsection (7)(d)(1) contains the mandatory direction that the carrier operating such equipment "shall remove any legend, showing it as the operating carrier, displayed on such equipment," as well as any removable device showing it to be the operating carrier, "before relinquishing possession of the equipment."

The validity of these regulations, substantially in their present form, and specifically of the requirement of a written 30-day lease when a certified carrier leases equipment, such as a tractor, for use in its authorized transportation, was sustained by the United States Supreme Court in *American Trucking Assos.* v. *United States, supra.*

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In the *American Trucking* case the most ardent attack on the regulations was directed against the minimum 30-day written lease requirement for the use of lessor-driven equipment in the business of the carrier. The Supreme Court found ample evidence in the record to show that the evil of trip-leasing adversely affected the entire Congressional regulatory scheme. The Court sustained the rule as being within the Commission's statutory authority. It was said to be reasonably designed to protect the traveling public on the highways from irresponsible independent contractor-lessors and their unsafe equipment, as well as to prevent certificated carriers from evading their responsibility in that connection through engagement of irresponsible persons.

After the *American Trucking* decision the attack on the rule continued and further hearings were held by the Commission. They resulted in the reaffirmance of the basic regulation, although some exceptions were approved (not material here) probably as the result of criticisms voiced in the dissenting opinion of two members of the Court. In its 1950 and 1956 reports, quoted in *Christian* v. *United States, supra,* 152 F. Supp., at p. 567, the Commission said:

> "The salutary objectives of that rule we think bear repeating. They are to insure responsibility for, and control over, the leased equipment by the lessee carrier, when the equipment is operated by the owner or employees of the owner. These are basic requirements that are inherent in the relation of the for-hire carrier to the public. When they are lacking, the chaotic conditions that preceded enactment of the Motor Carrier Act, 1935 inevitably ensue."

and:

> "It is clear that the hard core of the problem confronting the Commission * * * has been the owner-operator trip lease and its attendant evils, such as widespread indifference to carrier responsibility, to safety of operations, and to the scope of carrier operating authority."

There can be no doubt that the Commission regarded the trip-leasing arrangement as a device which made it difficult for a member of the public injured by the operation of a vehicle so leased to fix carrier responsibility. The regulatory aim was to remedy that evil and Congress concurred in the objective. See, *House Report No.* 2425 *—Motor Carriers—Trip Leasing,* 3 U. S. Code Cong. and Ad. News, 84th Cong. 2d Sess., p. 4304 (1956).

[1-3] The regulations described above have the force and effect of law. A franchised interstate carrier cannot evade them by making an oral or written lease with an owner-operator of equipment for a trip, for a day or for an indefinite period, which attempts to exclude or to limit their application. When such a carrier engages an owner-operator of a tractor intending to have him transport goods for it on the public highways in interstate commerce, and indicates that intention by qualifying him therefor by means of the required identification and decals, the regulations must be deemed included in their contract. *Vance Trucking Co.* v. *Canal Insurance Co.,* 249 F. Supp. 33, 39 (D. S. C. 1966); *G. L. Christian & Associates* v. *United States,* 320 F. 2d 345, 359-351, 160 Ct. Cl. 58 (1963); *Hartford Acc. & Indem. Co.* v. *Major,* 81 Ill. App. 2d 251, 226 N. E. 2d 74, 78 (App. Ct. 1967);

and see *Saffore* v. *Atlantic Cas. Ins. Co.*, 21 N. J. 300, 310 (1956); *Leotta* v. *Plessinger*, 8 N. Y. 2d 449, 209 N. Y. S. 2d 304, 171 N. E. 2d 454, 458 (Ct. App. 1960). Thus when a lessor-operator is engaged by the carrier for operation within the scope of the regulations he becomes what has been described as a "statutory" employee of the carrier, *Brannaker* v. *Transamerican Freight Lines, Inc.*, 428 S. W. 2d 524, 535 (Mo. Sup. Ct. 1968), and the relation between him, whether oral or written, is governed by the regulations. And when the relation arises, the carrier-lessee takes "exclusive possession, control, and use of the equipment, and * * * the complete assumption of responsibility in respect thereto, * * * for the duration of said * * * lease, * * *" (Section 1057.4 (a)(4)) which, as has been shown, must be for a minimum period of 30 days. Section 1057.4(a)(3).

[4, 5] Defendant Bond argues that since Section 1057.4 of the regulations says that a carrier "may perform authorized transportation" with lessor-owner operated equipment, the regulations and particularly Section 1057.4(a)(4) apply only when the equipment actually is engaged in its business on a public highway in interstate commerce. The contention requires analysis. If a franchised carrier needs the use of owner-operated tractors in his business, he may lease them exclusively for intrastate or exclusively for interstate transportation, or he may engage them to be available for both intrastate and interstate operation. If he engages the lessor-operator expressly for intrastate carriage alone, and exercises no control over the operation of the vehicles, ordinarily the lessor is an independent contractor and the I. C. C. regulations would not apply to the localized transportation. If the lease is for interstate transportation, manifestly Section 1057.4 of the

regulations does apply. If, however, there is evidence, even though conflicting, showing that the lessor-operator was engaged to be available generally in the carrier's business, both interstate and intrastate, and that the carrier by overt acts qualified him for such operation, and the jury finds that he was so engaged and qualified, then under the regulations the carrier must be held to have assumed "exclusive possession, control and use of" and to be responsible for the operation of the vehicle whenever it is being driven on the public highway in the interest of the carrier.

[6] The last situation creates the problem here. It is neither sensible nor consistent with the basic intention for the Commission—protection of the public against dangers incident to the operation of franchise-authorized vehicles —to apply such a vacillating standard as Bond suggests for determining whether the carrier is responsible under Section 1057.4(a)(4) of the regulations for a particular movement of an owner-operated leased vehicle. For example, franchised carriers are required to provide liability insurance not only to cover vehicles owned and used by them in authorized transportation, but also for non-owned equipment leased from the owner-operator to be used in such transportation. See 49 U. S. C. §315; *Vance Trucking Co.* v. *Canal Insurance Co., supra.* Insurance coverage which would protect an injured member of the public one day when the lessor-operated tractor was in interstate carriage, and which would shift away the next day because the leased equipment was in intrastate operation making the operator an independent contractor, thus relieving the carrier of vicarious liability, cannot be the result envisaged by Congress or the Interstate Commerce Commission.

[7, 8] In our judgment the I.C.C. regulations designed to control the use of leased equipment must be construed most liberally in the interest of members of the public using the highways. Applying that principle in light of the history of 49 U. S. C. §304(a)(7)(e) and the implementing regulations set out in Section 1057.4, we hold this view: When a lessor-operator is engaged by a franchised carrier to drive his equipment in the carrier's business and the carrier qualifies or invests him with authority to engage in "authorized" transportation by giving him the decals or signs required by the Commission to show such transportation, *prima facie* the arrangement is within and subject to Section 1057.4 of the regulations.

[9] In the present case it is undisputed that McCaskill and his tractor were engaged under an oral lease. He said the lease was for an indefinite period. It was for the season, *i.e.*, during the cold weather and he could not work during the season for another carrier without Bond's consent. He received his daily assignment from the dispatcher and felt bound to honor it. In the 1964-65 season McCaskill had worked fairly regularly and exclusively for Bond for a month and a half before the accident. It is clear from his testimony that his engagement was not limited to intrastate operation. He was hired to truck in the Bond business, and beyond question a jury could find that he was to haul Bond's trailers in both interstate and intrastate transportation when called upon to do so. In fact on one occasion in the six-week period noted above he did make an interstate trip and Bond obviously recognized that his lease authorized and required him to do so. In this connection it has been said that a person engaged in intrastate commerce by motor vehicle as a reg-

ular occupation is not exempt from Interstate Commerce Commission regulation "if he undertakes also even casual or occasional transportation" in interstate commerce. *Bass* v. *United States,* 163 F. Supp. 1 (W. D. Va. 1958). In fact, the Commission by administrative ruling has indicated that the leasing regulations apply unless the non-owned lessor-operated equipment is used solely in intrastate commerce. *Adm. Ruling No.* 104, 2 *C. C. H. Fed. Carr. Rep.* §25, 104 (1957). This ruling gives recognition to the Congressional intention that the use and operation of leased vehicles be put on a parity with equipment owned and operated by the authorized carrier and operated by its own employees. *Brannaker* v. *Transamerican Freight Lines, Inc.,* 428 S. W. 2d 524 (Mo. Sup. Ct. 1968).

Under all the circumstances, it was open to the jury to find that McCaskill's lease arrangement was within Section 1057.4 of the regulations, *i.e.,* that it was for more than 30 days and was to continue until the end of the cold weather season as understood by the parties. By virtue of such lease Bond came into "exclusive possession, control, and use of the equipment" and assumed complete "responsibility" of it for the duration of the lease. Section 1057.4(a)(4). As long as the decals remained on McCaskill's tractor a strong presumption existed that it was engaged in authorized transportation and that Bond was still in exclusive possession, control and use of it and was completely responsible for its operation. See *Mellon Nat'l Bank & Trust Co.* v. *Sophie Lines, Inc.,* 289 F. 2d 473, 476-477 (3 Cir. 1961); *Leotta* v. *Plessinger, supra,* 8 N .Y. 2d 449, 209 N. Y. S. 2d 304, 171 N. E. 2d, at p. 458; and *cf. United States* v. *Drum,* 368 U. S. 370, 381-382, 82 S. Ct. 408, 7 L. Ed. 2d 360, 367-368 (1962); *Calvine Mills Inc.* v. *United States,* 221 F. Supp. 1019 (D. N. J. 1963).

Bond could eliminate this presumption only by conforming with the regulations, *i.e.*, (1) removing "* * * any legend, showing it as the operating carrier, displayed on such equipment, and * * * any removable device showing it as the operating carrier, before relinquishing possession of the equipment," Section 1057.4(d)(1) and (2) obtaining the receipt called for by Section 1057.4(7)(b) which says that "when the possession by the authorized carrier ends; it or its employee or agent shall obtain from the owner of the equipment, * * * a receipt specifically identifying the equipment and stating therein the date and time of day possession thereof is taken." And see, *Mellon Nat'l Bank & Trust Co.* v. *Sophie Lines, Inc., supra,* 289 F. 2d, at pp. 476-477; *Leotta* v. *Plessinger, supra,* 8 N. Y. 2d 449, 209 N. Y. S. 2d 304, 171 N. E. 2d, at pp. 456-458.

[10, 11] Thus under the cases, presence of the decal and the Bond name on the door of the tractor at the time of the accident strongly implies operation thereof by McCaskill within the significance of Section 1057.4 of the regulations. The fact that he was driving as an independent contractor, as the trial court ruled, of itself has no important significance. The statute, 49 U. S. C. §304(e) and the regulations based thereon, when applicable, eliminate the common law distinction between an independent contractor and an employee. They create a type of statutory employment under which the franchised carrier becomes responsible for the negligence of the owner-operator at least when he is engaged in the activities of the carrier. (In view of the public policy expressed by the regulations it can be argued persuasively that when owner-operated equipment is leased by a carrier, the exclusive possession, control and use thereof, and "complete" assumption of responsibility imposed on the carrier for the "duration"

of the lease, subjects it to liability for the lessor's negligent operation so long as the lessor is on the public highway with the permission of the carrier. *Cf. Mellon Nat'l Bank & Trust Co.* v. *Sophie Lines, Inc., supra,* 289 F. 2d at pp. 476-477. But it is not necessary to deal with that problem in this case.) We have already indicated that there is no absolute requirement that the lessor-operator must be driving in interstate transportation at the time of an accident in order for the type of statutory employment envisioned by the regulations to exist. In our view when a lessor-operator is engaged for and authorized to operate in interstate business, as may be inferred upon the furnishing of a decal and a carrier name-sign for the leased equipment, and from the *actual use* thereof in interstate transportation on one occasion within a short time after the inception of the relationship, the carrier's responsibility for the negligence of the operator may be found during the period of the lease whenever the operation, whether intra or interstate, is in any way with the knowledge and for the benefit of the carrier.

[12] The evidence clearly justified the presumption that McCaskill was engaged in authorized operation for Bond at the time of the accident. Does the fact that he had finished his work for the day and was driving intrastate to his home in his "decaled" tractor so overcome that presumption that as a matter of law the issue of the carrier's special type of vicarious liability should have been taken from the jury and judgment entered for Bond? We think not. As is apparent from his own testimony, Bond's vice-president knew McCaskill was driving between his home and the company terminal with considerable regularity. The presence of the decal and ownership legend on the tractor at all times signified implied authorization to do so. But more than this,

the proof justified a factual inference for jury consideration that such operation served the special interest of and was of business benefit to both Bond and McCaskill. The company was aware of the uncertainty as to the time when McCaskill would receive word from the dispatcher about his next assignment. This fact was undisputed. Therefore the jury could find that the oral lease bound him to hold himself and his tractor available to report at the terminal at 4:00 or 5:00 A.M. ready to start his transportation route, fully identified as engaged in authorized operation, be it intra or interstate. Under all the circumstances we think it was for the jury to say whether Bond had a special interest in and received a business advantage from McCaskill's act in driving his tractor home at the time of the accident. And in that connection in our judgment the trial court was correct in submitting to the jury the specific question whether "at the time of the accident Manuel McCaskill was operating his tractor in carrying on the activity of the Bond Transportation Company." The jury's affirmative answer was amply supported by the evidence in the case, and it provided adequate basis for the verdicts for the plaintiffs.

Although the Appellate Division accepted defendant's contentions—that the I. C. C. regulations are not applicable and that a lessor-operator must be considered an independent contractor for whose negligence the carrier is not responsible unless at the time of the accident he is actually driving in interstate commerce—we disagree. As previously indicated we think such a doctrine would subvert seriously the Congressional objective of protecting the public against the operation of franchised truckers on the roadways. Research has revealed no case in this or a sister state in which the same circumstances and the same legal issues were presented. Study of analogous authorities, however,

has convinced us that the trial court properly viewed the matter of Bond's liability as one requiring determination by the triers of the facts.

Turnbow v. *Hayes Freight Lines, Inc.*, 15 Ill. App. 2d 57, 145 N. E. 2d 377, 66 A. L. R. 2d 1075 (App. Ct. 1957) bears upon our problem. Hayes Freight Lines was an I.C.C. franchised motor carrier. It had leased a tractor for exclusive use in its business. Under the agreement the lessor drove the tractor in the carrier's operation and he is described in the opinion as its employee. Upon completing a 350-mile trip on the day of the accident he returned to the carrier's lot after 11:00 P.M. That particular transportation assignment was ended then, and he had not been given any trip for the following day. However, his instructions were to telephone in to ascertain his next job. Under I. C. C. regulations he was required to have eight hours rest before the next trip. His home was many miles away. He detached this tractor from the trailer, left the lot and started down the highway in the direction of a motel where he had stayed previously. The motel was about a mile and a half away, and as he was turning left into its driveway he was involved in a collision with another truck, as a result of which the suit in question arose. The carrier was held responsible for his negligence, the court saying that even though his work assignment had terminated for the day he was still conducting himself within the framework of the I. C. C. rules. This opinion appears to conflict with *Schmidbauer* v. *Baltimore & Pittsburg Motor Exp. Co.*, 28 Md. 637, 181 A. 2d 325 (Ct. App. 1962) on which defendant here places substantial reliance. In our judgment *Turnbow* v. *Hayes Freight Lines* represents a sound and more just result. *Cf. Felbrant* v. *Able*, 80 N. J. Super. 587 (App. Div. 1963).

Appendix B

The Court of Appeals for the Third Circuit dealt with a similar problem in *Mellon Nat'l Bank & Trust Co.* v. *Sophie Lines, Inc., supra.* On September 24, 1955 Sophie Lines, a non-franchised trucker leased its truck and driver under a 30-day written lease to Turner Transfer, Inc., a licensed I.C.C. carrier with operating permits limited to the carrying of certain knitting equipment in fixed areas. Turner decals were then placed on the truck and a copy of the lease was carried in it as required by the regulations. On September 29, 1955 the truck left Reading, Pennsylvania, with half a knitting machine to be delivered at Concord, North Carolina. On the way the driver stopped at Greensboro, North Carolina, to arrange with the Turner dispatcher at that station for riggers to be on hand at Concord. The dispatcher instructed him that after unloading at Concord he should proceed to Henderson, North Carolina, a terminal for Sophie Lines and remove the Turner Transfer decals since there was no immediate need of the truck. Upon completion of the unloading at Concord the truck was driven to Henderson, as directed, and the driver advised the Sophie Lines' secretary that Turner had no present use for the vehicle. The secretary then ascertained that the Taylor-Thayer Lumber Company, a local corporation, needed a truck to haul some lumber to Elizabeth, Pennsylvania. The Turner Transfer truck and driver were then dispatched with the lumber. The Turner decals which read "Leased to Turner Transfer, Inc.," were not removed as had been directed by the Turner dispatcher. Nor was the receipt obtained which the I. C. C. regulations require when the possession of the carrier ends. Turner's franchise did not permit the carrying of lumber in interstate commerce; it was not informed of the trip, and was not to receive any part of

the revenue therefrom. Sophie Lines having no I. C. C. franchise had no authority to engage in such interstate transportation on its own. Turner Transfer, however, knew that on previous occasions in order to avoid an empty trip or deadhead, Sophie Lines had used its truck and driver to haul lumber for Taylor-Thayer. Turner profited from that practice whenever a truck carried a load of lumber while enroute to pick up Turner freight. In such instances the Sophie Lines mileage charge against it for an empty truck was eliminated. (Sophie Lines was later convicted of violating I. C. C. regulations in making these unauthorized trips for the lumber company.) During this particular trip to deliver the lumber, the truck was involved in an accident in Pennsylvania which resulted in damage actions against Sophie Lines and Turner Transfer. Noting that its decals were still on the truck at the time of the accident, the trial court held Turner liable as a matter of law and declined to submit the issue of its liability to the jury. The Court of Appeals affirmed rejecting the contention that the nature of the actual operation at the time of the mishap created a jury question as to whether Turner was responsible for the negligence of the driver.

The court said that one of the principal purposes, if not the primary purpose, of the I. C. C. regulations is the protection of the traveling public on the highway. It approved the declaration of liability even though Turner was not aware of the lumber carriage to Pennslyvania, had no legal authority under its franchise to transport lumber in interstate commerce, and had no direct interest in the revenue to be charged therefrom. The court pointed out that the accident occurred during the 30-day

term of the Sophie Lines-Turner lease and that under the regulations Turner had assumed exclusive possession, control and use of the equipment and full responsibility with respect to it for that period. Judge McLaughlin speaking for the court said Turner "could have effectually eliminated its responsibility for the truck's use in only one way," removing its decals and its name as the operator from the truck, and obtaining the receipt from Sophie Lines acknowledging return of possession to it from Turner. 289 F. 2d, at p. 476. The stipulation of the parties that Turner had told its driver to remove its name and decals from the truck at the Sophie Lines' Henderson terminal, and that he had failed to do so was not considered sufficient to establish a jury question as to whether the truck was engaged in Turner's authorized operation at the time of the collision. The continued presence of the decals and copy of the lease were regarded as creating a conclusive presumption that the truck was being operated on Turner business.

Bond attempts to distinguish the *Sophie Lines* case because the Turner tractor was in the course of an interstate trip when the accident happened. The interstate aspect may appear to make the case a stronger one than ours for the imposition of liability on the carrier. But if the lumber were being transported wholly intrastate and not to Pennsylvania, we do not believe a judgment for the defendant as a matter of law would have been required or ordered. At most, the different circumstances would have resulted in a jury question as to whether under the course of conduct shown, Turner was receiving an incidental benefit from the intrastate journey within the scope of the regulations.

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In *Leotta* v. *Plessinger, supra,* the New York Court of Appeals faced a somewhat similar situation. On November 15, 1956, Riggs Dairy Express Inc., an I. C. C. certificated carrier, entered into a written one-trip lease with the owner of a tractor, who also furnished the driver, Plessinger.[1] The agreement was for the carriage of an I. C. C. regulated cargo from Chicago, Illinois, to Somerville, Massachusetts. Upon arrival at the Somerville truck terminal, Plessinger unloaded his truck which bore Riggs' identification decals, and then in accordance with instructions called Riggs at Chicago to report the delivery. Since no return load was available, he proceeded, pursuant to Riggs' general manager's suggestion (given a year earlier but not made on this occasion), to a cargo broker's place of business at Avoca, New York. There being no return load available at that place, Plessinger detached the trailer and secured lodgings in Bath, New York (nearby Avoca). Two days later, while returning to the broker's place in the tractor he was involved in the accident which eventuated in the damage action. The trial court found a jury question as to Riggs' responsibility and plaintiff obtained a verdict. The Appellate Division reversed, holding that the contract between Riggs and Plessinger's employer was a one-way lease which had been fully performed five days prior to the accident at which time Plessinger was solely Holle's (the tractor owner's) employee.

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[1] At this time *Section* 1057.4(*a*)(3) providing that trip-leases "shall be not less than 30 days" was not in effect. *Subsection* (*a*)(6) specified (as it still does) that "The duration * * * shall coincide with the time for the giving of receipts for the equipment" under *subsection* (b), which requires the carrier to obtain a receipt from the lessor-owner or his employee showing relinquishment of possession by the carrier.

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The Court of Appeals disagreed with the Appellate Division. It referred to the grave concern of Congress over abuses and exploitation of trip-leasing, and the adoption of regulations by the Interstate Commerce Commission in order to provide safeguards and to delineate responsibility following an accident. Under these regulations, the court said, the leasing carrier assumed exclusive control and use of the equipment and the responsibility therefor; also it was obliged to "properly and correctly" identify the equipment for the period of lease, and at the end thereof to remove the identification and obtain a receipt showing relinquishment of possession to the lessor. After pointing out that the decal, copy of the lease and the unsigned receipt were still with Plessinger when the mishap occurred, and that it was customary for them to remain until the truck came to the home station, the court said:

> "* * * Riggs acquiesced in a violation of the express mandate of the regulations which provide for the proper method to relinquish possession. Since Riggs seemingly failed to comply, or take any serious steps to assume compliance, it does not seem unreasonable to leave the question of liability to a jury." 209 N. Y. S. 2d, at p. 309, 171 N. E. 2d, at p. 457.

It was declared further that the mandate of the regulations was not delegable to Plessinger, and that as a matter of law Riggs was in possession and control and, therefore, must assume responsibility. The opinion likened the truck bearing Rigg's identifying decal to a flag which proclaims the nationality of the ship flying it. The court

suggested that the carrier might introduce evidence to show that the identifying trappings were camouflage or innocent coincidence, or that the driver ignored instructions in failing to remove the decal; but "such explanations are for the jury to evaluate and appraise in the light of all the surrounding circumstances," 209 N. Y. S. 2d, at p. 310, 171 N. E. 2d, at p. 458. Judge Desmond in concurring expressed the view that as a matter of law the I.C.C. regulations fix absolute liability upon the carrier until it has relinquished possession as required and has caused the identifying insignia to be removed. 209 N. Y. S. 2d 304, 171 N. E. 2d, at p. 460.

In *Rosu* v. *Law,* 193 F. 2d 894 (3 Cir. 1952), Law, the owner of a tractor, was engaged under written lease by Blue Star Foods, Inc. to haul a load of frozen eggs in Blue Star's trailer from Council Bluffs, Iowa, to Sunbury, Pennsylvania. He was to be paid for both the outgoing and return trips. In addition he had permission to seek a return load, the revenue therefrom to go to Blue Star. Law made a delivery in Sunbury and then one in New York. Being unable to locate a return load, he drove to Philadelphia with that purpose in mind. Then he fortuitously learned at a truck stop that the Liberty Motor Freight Lines, Inc. had a customer located on the outskirts of Wilmington, Delaware, which desired some merchandise taken to Kansas City, Missouri. Law agreed with Liberty to transport it. During an afternoon conversation with the Liberty dispatcher, Law was told to come to the office (some three or four miles from the truckstop) that evening and obtain various necessary papers in connection with the shipment. This was to enable Law to be at the customer's plant in Wilmington

early the next morning before the Liberty office opened, and to expedite the 1,300-mile trip to Kansas City. That evening Law went to the office in his tractor, which he had detached from the trailer, signed the lease covering his equipment and the manifest, both dated the next day. He was then given a Liberty I.C.C. sticker for his tractor. On leaving the office he intended to drive the tractor back to the truck stop, reattach the trailer and start for the customer's plant, in order to be sure to arrive there early in the morning to pick up the load. On the way back to the truck stop he was involved in a fatal accident. Liberty argued that Law's operation under its I.C.C. license did not commence until the next morning when he picked up the load at the customer's plant. In view of the circumstances and particularly Law's possession of the I.C.C. sticker, the trial court held that the jury could find that at the time of the accident the tractor was being operated under the Liberty franchise. The Third Circuit Court of Appeals affirmed. 193 F. 2d 894. (3 Cir. 1952) It is to be noted that this case was decided before the advent of the present *Section* 1057.4 of the Commission's regulations.

In *National Trailer Convoy, Inc.* v. *Saul,* 375 P. 2d 922 (Okl. Sup. Ct. 1962) one Wix, owner of a tractor, made a one-year lease to haul trailers of National Trailer Convoy Inc., an I.C.C. licensee. The regulations of the Commission were incorporated therein by express reference. Pursuant thereto Wix hauled a trailer from National's establishment in Tulsa, Okla., to Abilene, Tex. He delivered the trailer and detached his tractor to return to Oklahoma. On the return trip he was carrying the money he had collected for National for hauling the load. He did not reach Tulsa until long after the office had closed for the night. Conse-

quently, he could not turn the money in, nor could he obtain the receipt called for by the I.C.C. regulations to show termination of the hauling assignment. Under the arrangement with National he was free to and customarily did, drive the tractor to and from his home, and he drove it on National's business at any hour of the day or night he chose, with a certain exception not material to the litigation. Apparently he intended to spend the rest of the night at his home in Claremore, Okla. Somewhere either in Tulsa or along the way he had some drinks. He drove off the turnpike at the Claremore interchange, but, according to his testimony, after doing so he remembered his wife's opposition to his drinking. He then turned around and drove through the tollgate toward Tulsa, intending to drive to a place along the turnpike where he could park the truck and sleep in it until morning when he would again start for home. After driving a short distance, he stopped on the turnpike, turned off the lights and did not put out a signal or flare to warn motorists of the tractor's presence. Some time later a motorist collided with the rear of his vehicle and was fatally injured. His widow obtained a verdict against Wix and National. At the trial National argued unsuccessfully that at the time of the accident all of its business with Wix had been concluded, and that he could no longer be considered its employee. The Supreme Court affirmed the trial court saying that under the circumstances, including the fact that Wix had not yet "checked in" with the company "off the Abilene trip, nor in any other formal, bilateral, or contractual manner terminated his engagement for National under the parties contract * * *, the evidence as a whole was sufficient to go to the jury for determination of the question as to whether or not, at the time of the accident, Wix was the agent, and still employed in business, of National, as comprehended in the parties' agreement * * *." 375 P. 2d at 927.

Appendix B

We regard Judge Kilkenny's opinion for the Appellate Division in *Felbrant* v. *Able,* 80 N. J. Super. 587 (App. Div. 1963) as sound and substantially expressing the conclusion we have reached in the present case. Able, owner of a tractor-trailer executed a written lease of the equipment to Service Transport Company, an I.C.C. carrier. The lease provided, as required by the regulations, that for its duration the equipment would be in the exclusive possession, use and control of the carrier (which was given the right to halt the movement of the vehcile), that the carrier's decal and legend woud be displayed on it, and that when the services were completed the identification markers would be removed completely. Service Transport Company owned and operated eleven freight terminals, two of them being at Norristown, Pennsylvania and Parma, Ohio. Its transportation business covered seven states. Able's "domicile" terminal was considered to be Norristown, Pennsylvania, because he lived relatively nearby in Pottstown, Pennsylvania, and he customarily reported at Norristown. He would be given an assignment there and upon its completion would call the nearest Service Transportation terminal for another. If there was no load available he would "be taken off duty." Then he could remain in the area and wait for work or he could voluntarily return home. If the last delivery was in the "domicile" area, upon its completion he would drive his tractor-trailer to his home in Pottstown. On arrival home he would call the Norristown dispatcher and report his availability for another trip. There was no prohibition against his going home. He could do so at any time if there was no work for him, so long as he reported his intention to go home. On being given an assignment he would drive from home to the pick-up point and then proceed to the place of delivery. His compensation

was a percentage of the charges collected by Service Transportation for the trips he made.

Around September 9, 1960, upon receiving instructions from the dispatcher, Able left home, drove to the Norristown terminal, picked up a load of freight and delivered it to Parma, Ohio. Then he carried a second load from Parma to the Port Newark terminal, at Newark, New Jersey. Upon completion of the unloading at Newark he was informed by the Norristown dispatcher that there were no further work assignments at the time. Able then requested and was granted permission to go "off further service" in order to allow him to return directly to his home in Pottstown, about 20 miles from the Norristown terminal, so he could attend his ailing wife. While on Route No. 1 in Elizabeth, New Jersey, on his way home, he collided with another vehicle. At this time the Service-Able lease was still in existence and the decal was still on the tractor-trailer, although it was easily removable. In the ensuing litigation Service maintained that its vicarious liability under the I.C.C. regulations for the negligence of an independent contractor-lessor did not exist unless the lessor-operator was engaged in interstate commerce and on the carrier's business. It contended further that since Able was engaged at the time on a personal mission not related to its authorized transportation activity, it had no responsibility as a matter of law.

The trial court entered summary judgment for the carrier but the Appellate Division reversed. It pointed out that Able's return trip empty from Port Newark instead of remaining until another load was available either there or at some other terminal was authorized by Service. And it was immaterial that the journey from Port Newark to Pottstown was without compensation or that it was with

permission of the carrier to serve some personal purpose. Judge Kilkenny referred with approval to the portion of the opinion in *Mellon Nat'l Bank & Trust Co.* v. *Sophie Lines, Inc., supra,* 289 F. 2d, at p. 473, which declared that hte carrier's responsibility could have been eliminated only in one way, *i.e.,* removing the decal from the equipment and obtaining the required receipt evidencing surrender of the leased equipment to the lessor. Accordingly the summary judgment was reversed and the matter remanded for full development of the facts at a plenary trial.

In our judgment the result would have been no different if Able had returned to the Norristown terminal and went off duty at that point for his personal mission. In that event if the accident occurred during his intrastate trip home to Pottstown to care for his ailing wife, the presence of the I.C.C. decal on his equipment would still create, at least, a jury question as to whether he was engaged in Service Transportation's business. After Able arrived home and took care of his personal business he was obliged to telephone the dispatcher, just as McCaskill was, and advise that he was available for an assignment. In fact in Able's situation the time when he could be ready for work was somewhat indefinite because of his wife's illness. This contrasts with McCaskill's obligation which was to hold himself and his tractor in readiness for the next assignment which would come to him over the telephone either on the night of the accident or over the weekend.

Thus, under the circumstances of the present case and the authorities to which we have alluded, in our view it cannot be said as a matter of law that McCaskill's journey home flying Bond's flag so far removed him from the area of the carrier's authorized activity as to require the entry of judgment for the defendant. On the contrary,

the issue must be regarded as a factual one for jury determination.

The broad general language employed by the trial court in its charge in presenting the factual issue to the jury for decision, *i.e.* whether McCaskill was engaged at the time of the accident in carrying on the activity of Bond, we feel was sufficient to meet defendant's sole objection that liability could not be found against it unless the tractor was on an interstate mission in its behalf. That contention phrased in variant ways in Bond's brief must be rejected as a basis for reversal. Nor do we find any substance in the argument that submission of the case to the jury on the issue of defendant's liability violated Article I, Section 8, the Commerce Clause, or the Fourteenth Amendment of the United States Constitution.

Accordingly the judgment of the Appellate Division is reversed and the judgments in the trial court in favor of the plaintiffs are reinstated.

HALL, J.(concuring). Whether in a particular factual complex, the Motor Carrier Act and subsequent regulations of the Interstate Commerce Commission impose vicarious liability upon a trucking company-lessee of a motor vehicle for the negligence of the lessor-driver, an independent contractor, is actually a question of federal law, though very frequently, as here, one for determination by a state court. Since the United States Supreme Court has not spoken definitively in this area, the proper approach for a state tribunal is to seek conformity with the broad spirit and purpose of the federal enactments, which are fully spelled out in the majority opinion.

Here the dispositive facts are, in my view uncontradicted, or at the least, are in such an evidential posture that reason-

able men could not differ as to them and the conclusions to be drawn therefrom. Hence, the trial judge, as a matter of law, should have granted plaintiff's motion for a binding instruction to the jury that Bond Transportation was vicariously liable if it found the driver negligent. Since the jury's finding that the driver was negligent is not challenged and no other prejudicial error appears, I would reverse the Appellate Division and affirm the trial court judgment on this basis. The question raised by Bond as to the correctness of the special interrogatory put to the jury on the issue of vicarious liability and the judge's instructions with respect to its resolution would thereby become academic. To decide, as the majority does, that the issue was one for jury determination in this state of the proofs can only lead to confusion in future cases.

The operative facts are admittedly different from those in most state and federal court cases dealing with the question. In those decisions the accident happened while both the vehicle and the lessor-driver were or had been away from the home state preceding, following, or during a gap in, interstate transportation. Here, on the other hand, the accident was in no way connected with an interstate transportation. On the day in question, and, in fact, on all but one previous occasion during the lease period, the hauling was entirely within the State and the mishap occurred while the lessor was driving his tractor home from Bond's terminal (both locations being in New Jersey, a few miles apart) after the day's work with the expectation of a similar assignment the next working day. But I do not believe that such a factual distinction precludes a legal conclusion of vicarious liability under the current federal regulations. The same conclusion must also be reached with regard to Bond's even broader contention that liability cannot be

imposed unless, at the moment of the accident, the vehicle was actually engaged in interstate commerce.

Furthermore, I do not deem it significant that a 30-day minimum written lease, which is required by the Commission's regulations, had not been executed; there can be no dispute that, in legal effect, an oral lease existed covering Bond's use of the tractor during the winter heating season. Vicarious liability cannot be avoided simply by absence of a written instrument for at least the minimum period in evasion of the law. Trip leases being now forbidden, the case must be viewed as though the requisite written engagement had been entered into.

The dispositive facts in this case, as I see it, are Bond's furnishing a decal (in one form or another) to the lessor-driver bearing its Interstate Commerce Commission franchise number, and the continuous attachment of a decal to the leased tractor at Bond's direction. Although the testimony is confusing in some respects, viewing it most favorably to Bond indisputably demonstrates that this is so. Photographic evidence establishes beyond doubt that the cardboard decal, at least, was on the tractor at the time of the accident; and there is no evidence that the lessee at any time had ordered its removal. It is to be observed in this connection, that, clearly, a decal is not required by any federal regulation to be affixed where the leased vehicle is to be and is in fact employed only for intrastate transportation. Moreover, Bond's contention that its name was required on the tractor by the New Jersey motor vehicle law is erroneous. N.J.S.A. 39:4-46 demands only that the name and municipality of residence of the owner, lessee, *or* lessor appear on a vehicle. Here the photograph shows that the owner-lessor's identification was already painted on the cab.

I would hold that the decal conclusively evidenced Bond's intention to have the vehicle available and under its exclusive control for the entire lease period for interstate as well as intrastate transportation, and that Bond should not now be able to claim otherwise. This being so, the federal enactments must apply throughout, and Bond is required thereby to assume full responsibility to the public for the operation of the vehicle. Vicarious liability for this accident consequently attaches as a matter of law. This conclusion best comports, I believe, with the spirit and purpose of these enactments and is supported by the rationale of the better considered opinions in this field. See particularly *Mellon National Bank & Trust Co.* v. *Sophie Lines, Inc.*, 289 F. 2d 473 (3rd Cir. 1961), where, although the accident occurred on an unauthorized return trip digression following an interstate hauling, the court decided that the only way the lessee could have avoided responsibility was by conforming to the specific requirements of the regulations, which mandated the removal of its decal before relinquishing possession of the equipment and the obtaining of a receipt for the vehicle from the owner. Not having done so, the lessee was held vicariously liable as a matter of law. See also *Leotta* v. *Plessinger*, 8 N. Y. 2d 499, 209 N. Y. S. 2d 304, 171 N. E. 2d 454, 460 (1960) (concurring opinion of Desmond, C. J.); *Turnbow* v. *Hayes Freight Lines, Inc.*, 15 Ill. App. 2d 57, 145 N. E. 2d 377, 380, 66 A. L. R. 2d 1075 (App. Ct. 1957); *Felbrant* v. *Able*, 80 N. J. Super. 587, 590 (App. Div. 1963).

If more on the question of Bond's intention is required, it is found in the one interstate trip undertaken by the lessor-driver during the period. Whether that hauling was Bond's job conducted under cover of another's franchise, or was the job of the other and Bond subleased the equipment, Bond's

intention to have the leased vehicle available for interstate transportation is clearly evident.

Additionally, it is to be noted that the ill-fated trip from the terminal to the lessor's home, in accord with a frequent practice and with Bond's full knowledge and acquiescence, was in the latter's business interest by assuring the lessor-driver's availability at the terminal for the next early morning assignment. *Cf. Wright* v. *Globe Porcelain Co.*, 72 N. J. Super. 414 (App. Div. 1962); *Prosser, Torts* (3rd Ed. 1964), §69; 2 *Harper and James, Law of Torts* (1956). §26.7, p. 1378.

It may be added that at the trial, and in the appellate briefs as well, all counsel were of the view that the question of vicarious liability was a matter of law, one way or the other, and not a fact question for jury determination. The trial judge was of the same mind, but I felt that *Felbrant* v. *Able, supra,* dictated otherwise. I cannot so read that opinion.

I concur in the result reached by the majority.

For reversal—Chief Justice Weintraub and Justices Jacobs, Francis, Proctor, Hall, Schettino and Haneman.—7.

For affirmance—None.

Appendix B

JUDGMENT AND MANDATE ON REVERSAL OF SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
Appeal Docket No. 6058

EDWARD A. COX,

Plaintiff-Appellant,

vs.

BOND TRANSPORTATION, INC.,

Defendant-Respondent.

It is hereupon ordered and adjudged that the judgment of the Superior Court, Appellate Division is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that the record and proceedings be remitted to the Superior Court, Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice

Judgment Entered January 27, 1969

Mandated Issued February 6, 1969

A True Copy

JOHN H. GILDEA
Clerk
Clerk of the Supreme Court

APPENDIX C

(Conflicting Opinions)

DECISION IN SCHMIDBAUER v. BALTIMORE & PITTSBURGH MOTOR EXPRESS CO.—181 A. 2d 325 (MARYLAND)

228 Md. 637

WILLIAM J. SCHMIDBAUER, etc., *et al.*

v.

BALTIMORE AND PITTSBURGH MOTOR EXPRESS CO.

No. 272.

Court of Appeals of Maryland.

May 18, 1962.

Injury action brought against interstate motor carrier to impose liability upon it for conduct of owner-operator of tractor-trailer which it leased, while he was driving on personal mission between interstate movements. The Baltimore City Court, Anselm Sodaro, J., rendered a judgment in favor of the carrier and the plaintiffs appealed. The Court of Appeals, Prescott, J., held that Interstate Commerce Commission regulation under Motor Carrier Act does not impose liability on franchised carrier, between interstate movements, when nonowned equipment is being utilized in activity that is entirely disassociated with in-

terstate or foreign commerce, such as activity of tractor when driven by owner returning from movie to bunkroom.

Affirmed.

Bayard Z. Hochberg, Baltimore (Paul Berman, Sigmund Levin, George D. Solter, Theodore B. Berman and George Sempeles, Baltimore, on the brief), for appellants.

Herbert F. Murray, Baltimore (Clater W. Smith, Robert E. Powell and Smith, Somerville & Case, Baltimore, on the brief), for appellee.

Before HENDERSON, HAMMOND, PRESCOTT, MARBURY and SYBERT, JJ.

PRESCOTT, Judge.

This is an appeal by William T. Schmidbauer and his employer's workmen's compensation insurer, plaintiffs below, from a judgment entered in the Baltimore City Court in favor of the appellee, Baltimore and Pittsburgh Motor Express Co. (Company or appellee), one of the defendants below, after the court granted appellee's motion for a directed verdict in its favor.

The prinicpal question involved is a claim by the appellants that the trial court erred in refusing to submit to the jury the issue of appellee's responsibility as a common carrier franchised and duly certificated by the Interstate Commerce Commission (I.C.C.) for the negligence of one Selle, an unfranchised owner-operator, whose motor tractor was allegedly under lease to appellee at the time of a motor vehicle collision, in which Schmidbauer was injured.

Appendix C

On May 16, 1956, at about 1:40 a.m., Schmidbauer, while in the course of his employment, was operating a taxicab east on Baltimore Street, approaching its intersection with Gay Street. He entered the intersection on a green light, and a motor tractor, being operated in a northerly direction on Gay Street by Selle, came through a red light and collided with the taxicab (there is no controversy concerning the fact that Selle was negligent). The tractor was registered in Selle's name, and bore Pennsylvania license plates. Selle was a resident of that State, and had an operator's license therefrom.

Selle first began to haul freight for the appellee in June, 1955, under what he, Selle, referred to several times as a written lease,[1] whereby he "leased" his tractors to appellee to pull its trailers. Selle was an unfranchised owner-operator, who held no certificate from the I.C.C. to operate motor vehicles or perform transportation services in interstate commerce. The appellee was a common carrier of freight, duly franchised and certificated by the I.C.C. to operate in Maryland, Ohio and Pennsylvania. In order to render efficient and economical service, appellee employed salaried drivers of its own, and, in addition, augmented its own equipment and personnel by acquiring the services and equipment of others, this practice being quite prevalent in the industry.

Selle testified that he owned no trailers but hauled appellee's trailers. His tractor bore appellee's decals issued

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[1] Appellee contends that no lease was ever executed between it and Selle as required by the I.C.C., other than a "Memorandum of Agreement," dated June 15, 1955, which relates only to damage to equipment. More will be said concerning this later.

by appellee, and owner-operators were instructed to "X-out" appellee's name after arrival at their destinations. He was paid once a week on the basis of the number of tons of freight hauled during the week, and the longer the trip the more per ton he received. Appellee had no ownship interest in Selle's tractor. He serviced and greased his own vehicle and paid for his repairs. Appellee paid Selle only for the tonnage he hauled, and for nothing else.

Selle stated that he entered into only the one written lease of his equipment during the entire period of his relationship with appellee, and he carried this lease with him all the time. He and appellee did not execute a trip lease for each trip made by Selle; rather, he leased his tractor to appellee at times when appellee would require it. The lease he signed was not for any specified period of time and it did not have to be renewed; rather it was good until Selle "left the company • • • they didn't have to be renewed." No period of 30 days was mentioned, and, during the time that Selle was under lease to appellee, he would have to make his tractor available to appellee at any time appellee wanted it. Selle testified that appellee would contact him when he had a load of freight, and he would be given a manifest covering the load from the point of departure to the point of destination. Appellee dispatched from its terminals at 5:30 every evening. When Selle did not have a further run scheduled he would go home with his tractors if he were in Pittsburgh, but in other places he would let them "set at the terminals."

James F. Erb, appellee's Director of Safety, stated that generally when his company used non-owned equipment,

the owner-operators contacted appellee by phone. Appellee dispatched from its terminals every afternoon at 5:30. The owner-operators were given a waybill and a manifest at the terminal from which they departed, and these documents were turned in at their destination. He said that appellee had no jurisdiction "over the drivers" after they had turned in their manifest.

August H. Plitt, former Baltimore terminal manager of appellee, testified that there was no Company rule known to him which precluded persons like Selle from using their vehicles between actual hauls, "they were more or less on their own. We had no jurisdiction over them; at least we didn't maintain any jurisdiction" over them.

From the time Selle first began to haul for appellee, he worked for it steadily, averaging four or five trips a week; he, alone, drove his tractors, and he worked for nobody else during this period. On his last haul prior to the collision he was dispatched by appellee out of Ohio or Pennsylvania on the evening of May 14, 1956, with a load of miscellaneous freight, and he arrived in Baltimore on May 15, at approximately 9:00 to 9:30 p.m. He was hauling for appellee, and proceeded to appellee's terminal where he dropped the trailer, and turned in his manifest and bills to appellee's office. At that time, he knew there would be no dispatch until the following evening, and that until then he would be unable to get another trip out of appellee's terminal. No receipts for the equipment were exchanged between Selle and appelle at that time, or at any time prior to the collision.

Since there was no one else at the terminal, Selle drove downtown in his tractor, alone, and he went to a movie. From the movie, he went to get a sandwich and a couple

of bottles of beer at a place where he used to go "once in awhile." He then started back to appellee's terminal where it maintained a bunk room that drivers were permitted to use for sleeping when in Baltimore.

While proceeding toward the bunk room, the collision occurred. At the time of the collision, the tractor had both the name of the appellee and its I.C.C. permit number displayed on its side, and Selle was carrying a copy of his lease" with appellee in his cab. At 5:30 p.m., on the date of the accident, he picked up, at its terminal in Baltimore, a load of freight for the appellee and carried it to Pittsburgh.

There can be little doubt that even after the enactment of the Motor Carrier Act of 1935, many evils existed in the motor carrier industry. 51 M.C.C. 461; 52 M.C.C. 675; 64 M.C.C. 361; 68 M.C.C. 553. In 1950, after a nationwide investigation of this complex industry, Division 5 of the I.C.C. published a report and recommendations in 51 M.C.C. at page 461. Some of the evils in this area of commerce arose out of the practice of authorized carriers using vehicles that belonged to others. The use of these nonowned vehicles was made under a great variety of arrangements, ranging from loose, informal oral agreements, made over the telephone or on the spot, between a franchised carrier, or someone for him, and the owner of the vehicle (who might or might not intend to be its operator), in many instances for a single-haul or round-trip movement, to formal written instruments applying for definite periods of time. (The single-haul arrangement is generally referred to as a trip lease, or one-trip lease.) Because of the looseness and informality of the arrangements for the use of equipment, questions fre-

quently arose as to liability for accidents resulting in injuries to the public, and as to what insurer was liable at a particular time, the insurer of the authorized carrier or the insurer of the owner, and when the liability of one ended and the other began.

In order to cure some of the complexities then existing in the industry and to protect the public more securely and more certainly, the I.C.C., effective as of September 1, 1953, fortified the Motor Carrier Act of 1935 (49 U.S.C.A. § 301 et seq.) with important Regulations governing motor carriers of interstate and foreign commerce, (Effective as of April 2, 1957, the short-term, or trip lease was abolished, but that was after the date of the collision here involved.)[2]

The pertinent provisions of Title 49 C.F.R. Transportation, Part 207, at the time of the accident, read as follows:

> "§ 207.1. *Applicability.* The rules and regulations in this part apply to the augmenting of equipment * * * in interstate or foreign commerce * * *."
>
> "§ 207.4 *Augmenting equipment.* * * * authorized carriers may perform authorized transportation in or with the equipment which they do not own only under the following conditions:
>
> "(a) The contract, lease, or other arrangement for the use of such equipment:
>
> "(1) Shall be made between the authorized carrier and the owner of the equipment.

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[2] In Gallagher's Estate v. Battle, 209 Md. 592, 609, 122 A. 2d 93, it is stated, apparently in error, that the effective date of this Regulation, now Section 207.4(a) (3), was September 1, 1953.

"(2) Shall be in writing and signed by the parties thereto, * * *.

* * *

"(4) Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the authorized carrier, as follows:

"(1) For the duration of said contract, lease or other arrangement, * * *.

* * *

"(6) Shall specify the time and date or the circumstances on which the contract, lease, or other arrangement begins, and the time or the circumstances on which it ends. The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment, as required by paragraph (b) of this section; and

* * *

"(b) *Receipts.* When possession of the equipment is taken by the authorized carrier or its regular employee or agent authorized to act for it, said carrier, employee or agent shall give to the owner of the equipment, or the owner's employee or agent a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is taken; and when the possession by the authorized carrier ends, it or its employee or agent shall obtain from the owner of the equipment, or

its regular employee or agent duly authorized to act for it, a receipt specifically identifying the equipment and stating therein the date and the time of day possession thereof is taken.

* * *

"(d) *Identification of equipment.* The authorized carrier acquiring the use of equipment under this section shall properly and correctly identify such equipment as operated by it *when such equipment is operated by or for such carrier, during the period of the lease,* contract, or other arrangement, in accordance with the Commission's requirements in Ex Parte No. MC-41; Part 166, Identification of Motor-Carrier Vehicles. * * *.

"(1) The authorized carrier operating equipment under the rules in this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment." (Emphasis ours.)

The appellants were unable to prove (and the appellee did not produce) any written agreement between the carrier and the owner-operator, other than the "Memorandum of Agreement" referred to above, which dealt only with the question of liability, as between the parties to the agreement, for damages to their respective equipment. Appellee contends this was the only written agreement between it and Selle, and concedes that no receipts were exchanged by it and Selle as anticipated by §207.4 (b) and that it did not require him to remove its legend

as aclied for by §207.4(d) (1) (Erb testified these regulations were just not enforced at the time, and the Company did not comply with them); but appellee claims its arrangement with Selle was for a one-trip hauling, which was legal at the time of the collision, and its responsibility for his tractor ceased when he delivered its trailer to the terminal and turned in the manifest. Appellants counter by contending, *inter alia,* that Selle had been hauling, exclusively, for the appellee nearly a year; that it only had one written contract with him; that he had hauled, under it, on the average of four or five trips a week for the appellee; that the provisions of the above quoted Regulations were, by law, made a part of any agreement or arrangement between appellee and Selle; that the evidence permitted a rational inference that Selle, at the time of the accident, was awaiting a return haul for the appellee; and, as a consequence of the above, a jury question was presented as to whether or not Selle was hauling for the appellee under a long-term arrangement, or a one-trip lease. The appellants further contend that, if the Court disagrees with the aforesaid claim, the evidence, conclusively, shows that Selle was operating under a one-trip lease, with the Regulations made a part thereof by law, and this lease had not been terminated at the time of collision, due to appellee's failure to comply with §207.4(b) and (d) (1). It will not be necessary to elaborate upon these contentions. For the purposes of our decision, we shall assume without deciding, that Selle was hauling for the appellee under a long-term arrangement, with the said Regulations engrafted therein by law, which places the appellants in the best position they can occupy under the contention now under consideration.

Appendix C

The undisputed evidence in this case shows that Selle was an independent contractor,[3] for whose negligence the appellee, under well-recognized principles of negligence law, was not responsible, unless that responsibility was created by the above quoted Regulations (more will be said concerning this later).

However, the appellants argue that the provisions in the Regulations requiring the franchised carrier to assume exclusive possession, control and use of any nonowned equipment, and the assumption of responsibility in respect thereto for the duration of the contract, lease or other arrangement for the said equipment, were intended "to *insure* (italics ours) that the public will be secured and protected from the negligent or reckless conduct of those who participate in, or who affect, commerce."[4] In other words, they claim the Regulations impose vicarious liability upon a certificated carrier for the negligent operation of nonowned equipment for the duration of the carrier's lease under almost any and all circumstances, regardless of whether the equipment is being operated in furtherance of the carrier's business or in an activity that has any relationship to interstate or foreign commerce. We are unable to agree.

[1-4] It is unquestionably true that the Regulations were designed to prevent a franchised carrier of interstate or foreign commerce from denying responsibility for the negligent operation of its nonowned equipment by

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[3] Marine v. Service Trucking Co., 225 Md. 315, 170 A. 2d 188.

[4] Appellants do not claim that §207.4(4) and (4) (1) require a carrier to indemnify an owner-operator against his own negligence.

simply employing an independent contractor to do the hauling.[5] And, if the failure of the carrier to require a removal of its legend before relinquishing possession of equipment and/or its failure to obtain a receipt stating the time and date of such relinquishment authorize an activity of the equipment (even though such activity be of a nature not originally anticipated by the carrier and owner-operator in their agreement) in interstate or foreign commerce, or an activity that bears a direct relationship to such commerce, then the carrier is responsible for the negligent operation of the equipment. Mellon National Bank & Trust Co. v. Sophie Lines, Inc., 289 F. 2d 473 (C. A. 3rd). But it is firmly established that the power of Congress to control intrastate transactions on the ground that they affect interstate commerce is confined to transactions which directly affect interstate commerce. Where there is merely a remote connection, or no connection, the power to regulate remains in the State. Schechter Poultry Corp. v. United States, 295 U. S. 495, 544, 55 S. Ct. 837, 79 L. Ed. 1570; National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 37, 57, S. Ct. 615, 81 L. Ed. 893; United States v. Darby, 312 U. S. 100, 119, 61 S. Ct. 451, 85 L. Ed. 609; United States v. Wrightwood Dairy Co., 315, U. S. 110, 119, 62 S. Ct. 523, 86 L. Ed. 726. And it will be noted that §207.1 specifically states: "*Applicability.* The rules and regulations in this part apply to the augmenting of equipment * * * *in interstate or foreign commerce* (italics ours) * * *." From the above, it seems clear to us that the I.C.C. only intended Part 207 of its Regulations to apply

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[5] Leotta v. Plessinger, 8 N. Y. 2d 449, 209 N. Y. S. 2d 304, 171 N. E. 2d 454; Costello v. Smith, 1 Cir., 179 F. 2d 715. Cf. Gallagher's Estate v. Battle, footnote (2) above.

to interstate and foreign commerce. We, therefore, hold that §207.4 does not impose liability on the franchised carrier between interstate movements, when the nonowned equipment is being utilized in an activity that is entirely disassociated with interstate or foreign commerce, such as the activity of the tractor involved in the present case, as shown by the undisputed facts. The fact that appellee's name and I.C.C. permit number were displayed on the tractor and the fact that a copy of the lease was in the cab are immaterial in the case at bar. None of these was needed (in fact the name and permit number should not have been on the tractor) to carry on the movement in which the operator was engaged when the collision occurred. His Pennsylvania operator's permit authorized his driving the tractor. Cf. Simon v. McCullough Transfer Co., Inc., 155 Ohio St. 104, 98 N. E. 2d 19; Gallagher's Estate v. Battle, supra.

A close analogy exists between the status of the operator of the equipment in the instant case and the statuses of employees in cases dealing with whether railroad employees are engaged in interstate commerce, so as to bring them within the Federal Employers' Liability Act, 45 U.S.C.A. §51 et seq. In Pryor v. Bishop, 234 F. 9 (C. A. 7), a member of a train crew was killed while resting in a caboose which was being transferred from one railroad yard to another after being removed from a train which had completed an interstate trip. The deceased's general employment was in interstate commerce, and the caboose was to be part of a train making an interstate run from Chicago, Illinois, to Montpelier, Ohio. The deceased and other members of the crew boarded the caboose to rest while it was detached. Under the terms of his employment, the deceased was subject to call at

any time after the expiration of an eight hour rest period to which he was entitled on completion of a trip. After the deceased had boarded the caboose, it was being hauled to another yard, where the train, eventually, was to be made up, when the deceased was killed. On these facts the Court held that the deceased was not employed in interstate commerce at the time of the accident, stating, 234 F. at 14-15:

> "In the instant case, however, there was no such duty [to be in the caboose]; the deceased could as well have been at a city hotel; his only duty at the time was to be within call, either personal or telephonic. That he was on the company's property at the time of the injury was due not to an obligation, but to a privilege, a license; in being there, he was acting, not as an employé, but as a licensee.
>
> "If, however, he could be deemed to be in the employment of the company at the time of the injury, nevertheless he was not then actually employed in interstate commerce. His actual employment at the time was holding himself ready in the city of Chiacgo to respond to a call for service. *That the call, when it came, would be for an interstate trip, does not make the waiting in Chicago an actual engagement in interstate commerce, within the terms of the federal act.*"[6] (Emphasis ours.)

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[6] For other illustrative F. E. L. A. cases see Hines v. Baechtel, 137 Md. 513, 113 A. 126, cert. den. 256 U. S. 698, 41 S. Ct. 537, 65 L. Ed. 1177, (employee of railroad company, injured while carrying to the telegraph office a message relating to the com-

(*Footnote continued on following page*)

Similarly in the case at bar, the fact that Selle might later obtain another haul from appellee and that he was on his way to appellee's bunk-room to sleep pending appellee's dispatch time the following evening does not make his waiting in Baltimore an engagement in interstate commerce.

The appellants have cited four cases, which they claim support their contention that the instant case should have been submitted to the jury: Leotta v. Plessinger, supra, 8 N. Y. 2d 449, 209 N. Y. S. 2d 304, 171 N. E. 2d 454; Mellon National Bank & Trust Co. v. Sophie Lines, Inc., supra; Duke v. Thomas, 343 S. W. 2d 656 (Mo. App. St. Louis) and Virgil v. Riss & Co., 241 S. W. 2d 96 (Mo. App. Kan. City). We shall not discuss them in great detail; to do so would make a long opinion much longer. We think they are all distinguishable from the case at bar.

(Continued from preceding page)

pany's supply of coal at a particular point, held not to be engaged in work sufficiently connected with interstate trains to exclude claim under State law); Erie R. Co. v. Welsh, 242 U. S. 303, 37 S. Ct. 116, 61 L. Ed. 319 (1916) (yard conductor, injured while alighting from a locomotive to report for orders, held not engaged in interstate commerce); Young v. New York, N. H. & H. R. Co. (C. A. 2, 1934), 74 F. 2d 251 (locomotive fireman held not engaged in interstate commerce when, after completing his day's work on a locomotive, he was riding another locomotive to a place where he had left a change of clothes); Boyer v. Pennsylvania R. Co., 162 Md. 328, 159 A. 909 (plaintiff railroad employee injured while riding to work in an automobile driven by co-employee, held not to be employed in interstate transportation).

In Leotta, the Court was divided. Two judges dissented, and Chief Judge Desmond wrote a concurring opinion. A careful reading of his opinion discloses that he thought the argument presented here by the appellants —that §207.4 creates responsibility in the franchised carrier for the negligent operation of nonowned equipment for the duration of its leasing, almost regardless of the surrounding circumstances—should prevail, but the majority were unwilling to so hold. The majority, obviously, realized that the plaintiff's evidence was thin, but felt that the evidence, and inferences that could be drawn therefrom, made out a *prima facie* case on the question of whether the operator of the nonowned equipment was operating within the scope of his employment by the carrier. The specific question of the relationship between the lessee-carrier and the operator of nonowned equipment when such equipment is engaged in an activity that bears no relation to interstate commerce was not discussed in the opinions. However, the opinions seem to have assumed that if the jury found that the operator of the nonowned equipment was operating within the scope of his employment at the time of the accident, he was engaged in a movement that bore a direct relationship to interstate commerce, as he was proceeding toward a terminal during office hours, where he anticipated picking up, and did finally pick up, a return haul in interstate commerce. In the other three cases there was a clear relationship between the activities of the drivers and interstate commerce; they were either operating their vehicles in interstate commerce, or performing acts which arose of necessity from an interstate movement.

[5] This brings us to a consideration of the relationship between Selle and the appellee when Selle's tractor

ceased being engaged in interstate commerce. We have stated above that Selle was an independent contractor (a fact which seems to be conceded by the appellants), who furnished augmenting equipment to the appellee, a franchised carrier. As long as such equipment was used in an activity that bore a direct relationship to interstate commerce, the provisions of §207.4 of the Regulations required the carrier to assume responsibility, to the public and to the shipper, for the operation of the equipment.[7] The Supreme Court of Ohio stated that I.C.C. Rule No. 4, the precursor of §207.4 (4) and (4) (1) made the driver of an independent contractor furnishing equipment to an authorized shipper the employee or servant of the shipper "so far as the public is concerned." Thornberry v. Oyler Bros., Inc., 164 Ohio St. 395, 131 N. E. 2d 383. But, when the equipment in the instant case was no longer engaged in interstate commerce, and therefore the provisions of §207.4 no longer operative, the ordinary relationship of lessee and independent contractor necessarily followed. And this was the relationship between appellee and Selle at the time of the accident, as established by plaintiffs' evidence.

[6] It is well-established law that when the ordinary relationship of principal and independent contractor exists, as distinguished from that of master and servant, or principal and agent, the principal is not liable (with exceptions not here pertinent) for the negligence of the

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[7] This, of course, is a departure from the modern concept of the doctrine of respondeat superior. For a history of the doctrine, see Henkelmann v. Insurance Co., 180 Md. 591, 26 A. 2d 418.

independent contractor.[8] Greer Lines Co. v. Roberts, 216 Md. 69, 78, 139 A. 2d 235; Hoerr v. Hanline, 219 Md. 413, 149 A. 2d 378; 2 Mechem, Agency (2nd ed.), §1858. Consequently, the trial court was correct in granting appellee's motion for a directed verdict.

The above makes it unnecessary for us to determine the question, raised by appellants, of the admissibility, *vel non*, of certain evidence.

Judgment affirmed, with costs.

DECISION OF SIMON v. MCCULLOUGH TRANSFER CO., 98 N. E. 2d 19 (Ohio)

155 Ohio St. 104

Simon v. *McCullough Transfer Co., Inc.*,
No. 32190.

Supreme Court of Ohio.
March 21, 1951.

Leland M. Simon, a minor, brought action by and through Tillie Simon, his next friend, against the Mc-

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[8] In cases of this nature, the question of what relationship actually existed between the alleged negligent operator and his superior, i.e., master and servant, principal and agent, or principal and independent contractor, is generally, one of fact for the jury, Fowser Fast Freight v. Simmont, 196 Md. 584, 78 A. 2d 178; but where, as in the instant case, the facts are uncontradicted and conclusive, the question of such relationship is one of law. Phipps v. Milligan, 174 Md. 438, 199 A. 498. Hoerr v. Hanline, supra. Grier v. Rosenberg, 213 Md. 248, 131 A. 2d 737.

Appendix C

Cullough Transfer Co., Inc., to recover for injuries sustained when truck of independent contractor, employed by defendant to haul freight, collided with automobile driven by plaintiff. The Court of Common Pleas entered a judgment for the defendant, and the plaintiff appealed to the Court of Appeals. The Court of Appeals for Mahoning County reversed the judgment of the Court of Common Pleas and remanded the cause to the Court of Common Pleas for retrial, and the cause was before the Supreme Court on the allowance of a motion to certify the record. The Supreme Court, Stewart, J., held that defendant was not liable for injuries negligently caused by independent contractor.

Judgment of Court of Appeals reversed and judgment of Court of Common Pleas affirmed.

Syllabus by the Court

A common carrier of freight by motor vehicle, who possesses a certificate issued under Part II of the Interstate Commerce Act, 49 U.S.C.A. §301 et seq., and employs an independent contractor, who does not possess such a certificate, to transfer port interstate freight in such independent ocntractor's truck carrying the permit plates of the common carrier, is not liable for an accident caused by the negligence of the independent contractor driving his own truck where, at the time of such accident, the independent contractor has entirely completed the transportation for the common carrier, had no further obigation or duty toward such common carrier and was driving the empty vehicle entirely under his own direction and control at a point distant from the location where he had completely unloaded the freight which he had been hired to transport.

Appendix C

On June 29, 1948, Leland M. Simon, a minor, hereinafter designated plaintiff, filed a petition against McCullough Transfer Company, Inc., hereinafter designated defendant. Plaintiff, being a minor, brought his action by and through Tillie Simon as his next friend.

Plaintiff alleged in his petition that defendant is an Ohio corporation engaged in the business of transferring, transporting and delivering merchandise and materials of every description, by means of motor trucks, to various parts of Ohio and other states of the Union; that on January 16, 1949, in the evening plaintiff was operating an automobile in a westerly direction on U. S. route 422 in Mahoning county; and that when he was in the intersection of U. S. routes 422 and 616, a large dump truck operated by Charles Bolton, an agent or employee of defendant, and traveling easterly on U. S. route 422 turned in a northerly direction at such intersection and came into violent collision with plaintiff's automobile, causing him bodily injuries for which he prayed damages.

To plaintiff's petition defendant filed an answer admitting its corporate capacity and its business of transporting merchandise and materials but denying that defendant owned the truck involved in the accident; that Charles Bolton, who was operating his own truck at the time of the accident, was operating such truck as the agent or employee of defendant; and that Bolton was operating his truck in the course of business and in the interest and on behalf of defendant.

Defendant alleged that Bolton, at the time of the accident, was not operating his truck in any manner in furtherance of the business of defendant but was operating the same without the consent of defendant and against the express orders of defendant.

Appendix C

Upon the trial it appeared that, at about the time alleged in the petition, plaintiff, with three companions, was driving an automobile westerly on route 422 toward the city of Youngstown and when he was in the intersection of route 422 with route 616, Bolton, driving a large dump truck and traveling easterly on route 422, turned to his left to go north on route 616 and collided with the automobile plaintiff was driving, causing plaintiff bodily injuries.

Charles Bolton lived in Sharpsville, Pennsylvania, and was the owner of the dump truck which he was driving. He was engaged by defendant to haul coal, whenever coal was available from a strip mine of the Buckeye Coal Company, near Grove City, Pennsylvania, to the rod and wire plant of The Youngstown Sheet & Tube Company at Struthers, Ohio, and was paid by defendant $1.20 per ton for coal so hauled.

Bolton had no public Utilities Commission or Interstate Commerce Commission permit, which defendant did have. Defendant furnished Bolton with its permits to attach on his truck while engaged in the hauling of the coal, and these permits were on the truck at the time of the accident. Defendant hired many other truckers under the same arrangement.

Bolton had hauled coal for defendant for approximately a year before the date of the accident, although he was in no sense restricted to haul only for defendant.

Bolton chose his own routes for making his trips and was not required to return to defendant's office or to the coal mine after he had picked up a shipment, nor was he required to report to defendant at the end of a trip. All expenses for the maintenance of his truck, including cost of

gasoline and oil, were paid by Bolton, and he was paid $1.20 per ton for the coal he hauled, without any deductions for income taxes, social security or any other charges whatsoever.

On the day of the accident, which was Friday, Bolton had delivered his last load of coal to The Youngstown Sheet & Tube Company at Struthers, Ohio, at about 5:30 p. m. By that time the coal mine was closed down until the following Monday, so that Bolton's work, so far as defendant was concerned, was finished. Before delivering the load of coal, following a usual practice, the coal was weighed by a weighmaster of a company which did the weighing for the Youngstown Sheet & Tube Company and a copy of the weigh sheet was given to Bolton which was to have been delivered by him to a representative of defendant to determine Bolton's compensation. For aught that appears in the record, Bolton had this weigh sheet in his pocket when the accident happened.

After delivering the last load of coal, Bolton proceeded with his empty truck to a beer garden and approximately two hours later, was involved in the accident, which occurred between two and three miles from where he had delivered the coal.

At the conclusion of plaintiff's evidence, the trial court instructed the jury to return a verdict for defendant and judgment was entered on the verdict so returned.

The Court of Appeals, with one judge dissenting, reversed the judgment of the Court of Common Pleas and remanded the cause to the latter court for retrial.

The cause is before this court upon the allowance of a motion to certify the record.

Appendix C

William E. Pfau and William E. Pfau, Jr., Youngstown, for appellant.

John Ruffalo and John Ruffalo, Jr., Youngstown, for appellee.

STEWART, Judge.

That plaintiff's evidence established the fact that Bolton was guilty of negligence which caused plaintiff's injuries was not questioned; the sole question before us is whether defendant is liable to plaintiff because of such negligence. The solution of that question depends upon the relation between Bolton and defendant.

This court recently decided a case which concerned a relationship almost identical with the one in the present case.

In Behner v. Industrial Commission, 154 Ohio St. 433, 96 N. E. 2d 403, 404, the question presented was whether a person performing services for the defendant in the present case and who had been killed in an accident in the performance of such service was an employee of defendant and thus covered by the Workmen's compensation Act.

In the syllabus of that case it is stated:

> "1. Whether an individual performing service for another does so as an independent contractor or as an employee is ordinarily a question of fact, the deciding factor being in whom is vested the right of control or superintendence as to the details of the work. If the right to control the manner or means of performing the work is in the person for whom the service is performed, the relationship is that of employer and employee or master and servant; but if the control of the manner or means of perform-

ing the work is delegated to the person performing the service, the relationship is that of independent contractor.

"2. A trucker who contracts with an Ohio corporation, engaged in the business of interstate commerce, to transport in interstate commerce without authority in his own right to engage in such transportation a shipment of freight by means of his own truck and equipment, services and maintained by him, to a designated destination for a fixed compensation, and who has the right to choose the route to be taken and to control the details of the transportation enterprise, including times and hours of employment, is an 'independent contractor' and not an 'employee,' even though he is obliged to carry and does carry such corporation's Interstate Commerce Commission plates on his equipment during the transportation operation."

Under the law as laid down in the Behner case, Bolton was unquestionably an independent contractor so far as defendant was concerned, but it is claimed that, since he was required to carry on his truck the Interstate Commerce Commission permit of defendant because Bolton was hauling coal in interstate commerce and had no such permit of his own, Bolton, at the time of the accident, was necessarily an employee of defendant by force of Administrative Rule No. 4 of the Bureau of Motor Carriers of the Interstate Commerce Commission, as authorized by Part II of the Interstate Commerce Act, Title 49, Section 301 et seq., U. S. Code, 49 U.S.C. §301 et seq.

Administrative Rule No. 4 of August 19, 1936, provided as follows:

"Question: Under what circumstances may a carrier add to its equipment by leasing a vehicle and obtaining the service of its owner-driver?

"Answer: The lease or other arrangement by which the equipment of an authorized operator is augmented, must be of such a character that the possession and control of the vehicle is, for the period of the lease, entirely vested in the authorized operator in such way as to be good against all the world, including the lessor; that the operation thereof must be conducted under the supervision and control of such carrier; and that the vehicle must be operated by persons who are employees of the authorized operator, that is to say, who stand in the relation of servant to him as master."

The rule, as above quoted, continued in force until August 9, 1939, when the rule was rephrased to its present form as follows:

"The lease or other arrangement under which the carrier utilizes in its operations a vehicle which it does not own, whether or not including the services of an owner-driver or his representative, must be of such a character that the carrier will have the right to direct and control the operation of the vehicle at all times and be fully responsible therefor in all respects under all applicable provisions of law governing the duties and obligations of the carrier to the shipper and to the public generally."

In paragraph three of the syllabus in the Behner case, this court held with reference to the foregoing administrative rule:

"3. The purpose of Administrative Rule No. 4 of the Bureau of Motor Carriers of the Interstate Commerce Commission, as authorized by Part II of the Interstate Commerce Act, 49 U.S.C.A. §301 et seq., to regulate interstate common carriers, is to make a carrier responsible to the public for wrongs done or injury inflicted by the carrier or those acting for it throughout the entire course of any transportation project undertaken by the carrier, and under such rule the employing carrier, as well as his independent contractor performing transportation for such carrier, may be held liable to third persons for injuries resulting from the negligent conduct of the independent contractor in such transportation."

This court had previously held, in reference to the Motor Transportation Companies Act and the Private Motor Carriers Act, Sections 614-84 to 614-120a inclusive, General Code, as related to interstate common carriers by motor vehicle, that a defendant in a tort action, who had a certificate to engage in motor transportation business restricted to interstate commerce and attempted to delegate the duty of the carriage of goods to one who did not have such a certificate, could not escape liability upon the ground that such delegee was an independent contractor. Duncan v. Evans, 134 Ohio St. 486, 17 N. E. 2d 913, 914.

In the Duncan case this court said in a per curiam opinion:

"Apparently the Legislature intended to protect the public against loss from negligence on the part of anyone using the highway in the business of transportation by motor truck. Therefore the trial courts were correct in charging the juries that these

> defendants could not escape liability by delegating their duties to independent contractors."

Thus it follows that if Bolton negligently injured plaintiff while the former was transporting coal in interstate commerce for defendant and using defendant's Public Utilities Commission and Interstate Commerce Commission permits, having none of his own, defendant would be liable for Bolton's negligence, even though Bolton was an independent contractor. But, as said in the Behner case, such liability exists only throughout the course of any transportation project undertaken by the carrier.

The decisive question then arises: Was Bolton in the course of any transportation project, undertaken by defendant, at the time of the collision with plaintiff's automobile?

[1, 2] The Court of Appeals held such question to be one for a jury for the reason that a jury would have been warranted in finding that Bolton and defendant intended that Bolton would continue in its transportation service at least until the weight sheet as to the tonnage Bolton had moved was returned by him to defendant's office. That court cited many cases to the effect that upon a motion to direct the party against whom the omtion is made is entitled to have the evidence construed most strongly in his favor. That principle is manifestly correct. That court also paid a high tribute to the Restatement of the Law and quoted from Restatement of the Law of Torts, Section 428, as follows:

> "An individual or a corporation carrying on an activity which can be carried on only under a franchise granted by public authority and which in-

volves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity."

We approve that statement. Where we part company with the Court of Appeals is as to the applicability of that principle to the facts in the present case.

At the time of the accident Bolton was not carrying on the activity for which he had been employed by defendant. His relationship with defendant had ceased about two hours before the accident, his truck was empty and he was not reporting back to defendant. Since Bolton owned his truck defendant had no knowledge as to where he was taking it or where he would keep it. Bolton did not park his truck upon any premises of defendant. Bolton had been to a beer garden and was on a route which led to his home, but, so far as any responsibility to defendant was concerned, Bolton could have gone anywhere he pleased, could have contracted for any work which suited him, and could have removed from his truck the Public Utilities Commission and the Interstate Commerce Commission permits of defendant because he did not need them at the time of the accident. He was in exactly the same situation as though he were driving his own automobile, with no objective except his own whim or purpose.

Even though Bolton had with him the weigh sheet, that sheet was for his own purpose, to wit, to show the amount of money he had coming from defendant, and the record does not sustain the statement of the Court of Appeals to the effect that "such weigh sheets were also used by the defendant as the basis for determining the

amount due it for such transportation service, it receiving a profit over and above the $1.20 per ton paid to Bolton."

It is true the record shows that defendant made an overriding profit on its arrangement with Bolton but it does not show that the weigh sheet in Bolton's possession was used by defendant as stated by the Court of Appeals. Assuredly, Bolton needed neither his own truck which he was driving nor defendant's permit plates in order to transport the weigh sheet.

Several cases have been cited in the briefs of counsel, not all of which are reconcilable, although in the case of Cotton v. Ship-by-Truck Co., 337 Mo. 270, 85 S. W. 2d 80, relied upon by plaintiff, the driver of the truck was was under an obligation to return to the terminal of his carrier hirer to deliver collections of money. In most of the other cases there were facts distinguishing them from the present case.

It seems to us that a recent decision by the United States Court of Appeals for the Second Circuit is not only practically on all fours with the present case but that the opinion of the court therein is so logical and reasonable that we quote from it rather fully. The case is entitled Costello, Adm'x v. Smith, 2 Cir., 179 F. 2d 715, 716.

The following question was there presented:

> "whether a common carrier of freight by motor vehicle, who possesses a certificate issued under Part II of the Interstate Commerce Act and employs an independent contractor, who does not possess such a certificate, to transport interstate freight under

a 'one-way' lease of the contractor's trailer-truck, is liable for a highway accident caused by the negligence of the contractor's truck-driver on the return trip of the empty truck."

In its opinion the court said:

"It is conceded that if the collision had happened on the out-bound trip to Providence, Johnson as lessee of the truck would have been liable for the truck-driver's negligence. A number of cases have so held. This is on the principle that one who can lawfully operate only unled a public franchise cannot escape liability by engaging an independent contractor to carry on the activity for him. Restatement, Torts, § 428. 'It is an exception to the independent contractor rule. However, that principle does not reach the present case. Here the independent contractor, Withers, had performed his contract with Johnson, the truck had been redelivered to Withers' agent Smith, and in returning to Charlotte, N. C., Smith [the driver] was engaged on Withers' [owner's] business, not on Johnson's. On general principles of agency Smith's negligence cannot be imputed to Johnson.

"The appellant argues that the exception to the rule of non-liability for the torts of an independent contractor should cover the return trip of the truck no less than the out-bound trip. The argument, if we understand it, replies both on the federal statute and on the local law of Connecticuit. As to the former, it is urged that to permit Johnson to escape liability will subvert the policy of the Act in so far as it seeks to provide for protection of the

public. See §§304(a) (3), 315. Such appears to have been the view of Judge Barksdale in Hodges v. Johnson, D. C. Va., 52 F. Supp. 488. With due respect we are constrained to disagree. So far as concerns the safety of the public, determination of what regulation is required rests with the Commission; the legislative grant is not to the courts. So long as the properly constituted authority is content not to regulate further than it has the operation of empty trucks after the termination of a 'one-way lease,' the courts may not properly by judicial decision supplement the commission's regulations. The Act itself does not prescribe conduct for Withers. He was not a common carrier by motor vehicle' as defined in § 303(a) (14) of the Act; hence he needed no certificate under § 306. * * * This is conceded in the supplemental briefs of the parties and the brief of the Commission as *amicus curiae*. Whether he was a 'private carrier of property by motor vehicle' as defined in § 303(a) (17) we need not say. The Commission's brief states that 'Private carriers are subject to the Act only with respect to safety of operations, hours of service of employees and standards of equipment, as indicated in Section 204(a) (3); and in none of these respects was Withers shown to have been in default. Nor do the present regulations forbid a common carrier such as Johnson from making a one-way lease with an independent contractor such as Withers. In the absence of statutory command or of regulatory action by the Commission, we cannot say that a one-way lease is so far contrary to the policy of the Act that a court should impose liability on the lessee after the lease has ended.

"Nor has any Connecticut decision been brought to our attention which would require or permit the imposition of such a liability under the local law. The appellant urges that in the absence of specific local authority we should rely upon section 427 of the Restatement of Torts as evidence of the law of Connecticut. The principle there stated is that 'one who employs an independent contractor to do work which is inherently dangerous to others is subject to liability for bodily harm caused to them by the contractor's failure to exercise reasonable care to prevent harm resulting from the dangerous character of the work.' It may well be doubted whether a trailer-truck is an intrinsically dangerous instrumentality to be classed with ferocious animals or high explosives in applying the above-quoted principle. * * * But in any event, the principle assumes that the person held liable 'employs' an independent contractor to do dangerous work. Johnson's employment of Withers ended with discharge of the cargo of the truck at Providence. While it was probable that Smith would drive the truck back to Charlotte, N. C. it was immaterial to Johnson whether or not he did so. It was no part of the venture for which Johnson had employed the independent contractor that the truck should return empty. As soon as the load was discharged at Providence Smith was at liberty to obtain another load to transport in any direction for another carrier authorized under the Act."

[3] Since at the time of the accident in the present case Bolton, an independent contractor, was in no sense under

defendant's guidance or control; since all business relationships between them were at an end, to be resumed, if at all, only by a subsequent consent or agreement between them; and since at such time Bolton was far away from where he had completed his work for defendant and was not engaged in any transportation project for defendant, it would be neither logical nor reasonable to cast liability for Bolton's acts upon defendant.

It follows that the judgment of the Court of Appeals must be and is reversed and that of the Court of Common Pleas affirmed.

Judgment reversed.

WEYGANDT, *C.J.*, and MIDDLETON, TAFT, MATTHIAS and HART, *JJ.*, concur.

DECISION IN ECKARD v. JOHNSON, *et al.*—70 S. E. 24 488 (NORTH CAROLINA)

235 N.C. 538

ECKARD v. JOHNSON *et al.*
No. 528.

Supreme Court of North Carolina.
May 7, 1952.

Osborne Eckard sued Thurman R. Johnson and Raymond W. Johnson, trading as Johnson Brothers Trucking Co., and Harvey C. Bradey for personal injuries alleged to have been caused by the negligence of the defendants. The Superior Court, Mecklenburg County, W. H. S. Burg-

wyn, Special Judge, rendered judgment in favor of the defendants Johnson, and plaintiff appealed. The Supreme Court, Devin, C. J., held that Brady's employment by Johnson under a trip lease agreement had terminated prior to the accident.

No error.

This was an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendants.

The plaintiff alleged that while he was at work near the highway between Conover and Hickory he was struck and injured by one of the rear dual wheels of defendant Brady's motor truck. It was alleged that the wheel came off while the truck was being driven along the highway by defendant Brady, that this was due to the negligent manner in which the wheel had been put on and secured, and that at the time defendant Brady was agent and employee of his codefendants Johnson and acting within the scope of his employment.

Defendant Brady did not answer and did not appeal from the judgment on the verdict in fixing him with damages for plaintiff's injury.

As to the liability of the defendants Johnson, the court submitted the following issue: "2. On the occasion in question was the defendant Brady the agent of defendants Thurman R. Johnson and Raymond W. Johnson and acting within the scope of his employment?" To this issue the jury for their verdict answered, "No."

From judgment that plaintiff recover nothing from defendants Johnson, the plaintiff appealed.

Appendix C

G. T. Carswell, and Shannonhouse, Bell & Horn, all of Charlotte, for plaintiff, appellant.

McDougle, Ervin, Horack & Snepp, Charlotte, for defendants, appellees.

DEVIN, Chief Justice.

Plaintiff's appeal brings up for decision the question of the liability of the defendants Johnson for the injury sustanied by the plaintiff as result of the negligence of defendant Brady. There was no controversy as to the material facts. At the time of the transactions herein complained of the defendants Johnson, residents of Elkin in Surry County, were engaged in business as carriers of freight by motor trucks and were duly licensed as interstate carriers by the Interstate Commerce Commission. They also maintained a warehouse and office in Hickory.

The defendant Brady was a resident of Conover in Catawba County, self-employed, and owned a ton and a half Chevrolet truck. His driver was one Gene Hester. Brady had no permit for interstate hauling.

September 25, 1947, defendants Johnson engaged defendant Brady to haul a truck load of furniture from Conover to Richmond, Virginia, and entered into a trip-lease agreement whereby the truck of Brady driven by Hester was engaged to transport the shipment of furniture in interstate commerce under the license of defendants Johnson. By this lease agreement it was stipulated that Brady agreed to furnish the truck and bear the expense of the operation in consideration of 80% of gross freight to be paid by the Johnsons. In addition the lease contained these pertinent provisions: "2. This lease is

made for the purpose of moving one lot of freight from Conover, North Carolina, to Richmond, Virginia. * * * 3. This lease becomes effective September 25, 1947, and terminates upon completion of delivery to the consignee of the freight at final destination. * * * 7. During the effective period of the lease, the possession and control of the leased equipment shall be entirely vested in the party of the second part (Johnson), and the said party of the second part will have complete supervision of the operation. Public liability, property damage insurance and cargo insurance are provided under blanket policies. For the duration of this lease, the drivers shall be deemed to be in the employment of the party of the second part."

According to the testimony of Brady, offered by plaintiff, the delivery of the freight to the consignee was completed by Brady's driver and the truck returned empty to Conover. Brady's driver was under instruction to secure a return load if possible, but this was not done on this occasion. The truck was returned to Brady in Conover September 27, but Brady did not recall whether it came the night before or that morning. He said the truck may have been there 8 to 18 hours, when he, Brady, undertook to drive the truck to Hickory. It was on this trip to Hickory that the wheel came off and injured the plaintiff. Brady testified he went to Hickory to collect his pay for the trip and to check the freight bill, that he had on occasion sent freight bills by mail. There was no provision in the lease agreement requiring Brady to drive the truck to Hickory, nor was there request from defendants Johnson that he do so. Brady had previously leased his truck to the Johnsons for numerous other interstate trips.

Appendix C

The plaintiff bases his right to recover against defendants Johnson on the ground that when these defendants leased Brady's truck and used it under their Interstate Commerce Commission license to haul freight in interstate commerce, they could not avoid liability for the negligence of the driver of the leased truck, even after delivery and on return trip, until the truck returned to its point of origin and the interstate transaction was completed, which included the return of the freight bill to defendants Johnson in Hickory. Plaintiff embodied this view in appropriate prayers for instructions based on Brown v. Truck Lines, 227 N. C. 299, 42 S. E. 2d 71, and Hodges v. Johnson, D. C., 52 F. Supp. 488. Pressing this view of the legal consequence of the trip-lease transaction, plaintiff requested the court to charge the jury as follows: "If you find from the evidence and by its greater weight that on the occasion in question defendant Harvey C. Brady, in returning the freight bills to the Hickory terminal of Johnson Bros. Trucking Company, was performing a necessary function as a part of an interstate haul to Richmond, Virginia, which he was making for the defendants Johnson under their Interstate Commerce Commission permit, then it would be your duty to answer the second issue yes."

The court did not charge in the language requested, but did charge the jury that before they could answer the issue "Yes" they must find from the evidence and by its greater weight that Brady was at the time of the injury the agent and employee of defendants Johnson, and that Brady's action in driving the truck was done in the prosecution of the business of the Johnsons, and that the act was connected with some mission or the performance of

some service for the Johnsons, and was necessary to complete the purpose of his employment and so intended. The jury answered the issue "No."

If we accept the plaintiff's view that the legal effect of the trip-lease agreement was to constitute Brady the agent and employee of defendants Johnson not only for the haul to Richmond, but also for the return journey to Conover, notwithstanding the provision in the lease that it was terminated upon completion of delivery to consignee at final destination, the determinative question still remains whether in subsequently driving the truck to Hickory to collect his pay and check freight bill Brady continued to occupy the relationship of employee of defendants Johnson and was acting in the scope of that employment. Was the interstate trip complete and the employment ended, or did the trip-lease agreement extend the employment to include driving to Hickory for the collection of pay and the delivery of freight bills?

In Brown v. Truck Lines, supra, the facts were that under the terms of a similar trip-lease agreement Brown, the driver of the leased truck was injured and killed while en route to deliver the freight to the consignee. It was held that for the purpose of that trip Brown was the employee of the lessee, and that his dependents were entitled to compensation under the Workmen's Compensation Act. G.S. §97-1 et seq. In the opinion this Court cited the case of Hodges v. Johnson, D.C., 52 F. Supp. 488, in which it was held that under a similar trip-lease agreement the relationship of employer and employee continued during the return trip, and that the lessee was liable for injury caused by the negligence of the driver of the truck.

[1] The plaintiff excepted to the refusal of the court to hold that Brady at the time of the injury complained of, as

an independent contractor, was employed by defendants Johnson under their Interstate Commerce Commission license to carry on an activity involving unreasonable risk of harm to others, which could only be carried on under the franchise granted, and that this imposed liability on the employer for the negligence of the contractor employed to carry on this activity. Restatement Law of Torts, sec. 428. Plaintiff also excepted to the court's refusal to submit an issue embodying this view. But we do not think this principle of law is applicable here. The injury complained of did not occur while goods were being transported in Brady's truck in interstate commerce under Johnson's franchise. The injury was sustained while Brady was driving the empty truck along a North Carolina Highway some time after the freight had been delivered and the truck returned to the place of origin. Costello v. Smith, 179 F. 2d 715, 718, 16 A.L.R. 2d 954. Nor should the Court characterize the driving of an empty ton and a half-truck a long the highway as an activity involving unusual or unreasonable risk of harm to others.

[2] The principle is firmly established that when a common carrier of freight by motor vehicles in interstate commerce lends the protection of his franchise to the vehicle of an independent contractor for a specified carrier, he may not be permitted to avoid responsibility for injuries resulting from the performance of the delegated authority. But this principle may not be extended to impose liability for the negligence of an independent contractor after the reason for the rule has ceased to exist. Brown v. Truck Lines, supra; Wood v. Miller, 226 N. C. 567, 39 S. E. 2d 608; Jocie Motor Lines v. Johnson, 231 N. C. 367, 57 S. E. 2d 388; Roth v. McCord, 232 N. C. 678, 62 S. E. 2d 64; Costello v. Smith, supra; Venuto v. Robinson, supra, 3

Cir., 118 F. 2d 679; Virgil v. Riss & Co.; Mo. App., 241 S. W. 2d 96; Cotton v. Ship-By-Truck Co., 337 Mo. 270, 85 S. W. 2d 80.

Except as modified by the trip-lease agreement under the Interstate Commerce Commission regulations as set out in the record, the relationship of Brady to Johnson was always that of an independent contractor. Jones v. Henderson Tobacco Co., 231 N. C. 336, 56 S. E. 2d 598; Wood v. Miller, supra; Hayes v. Elon College, 224 N. C. 11, 29 S. E. 2d 137.

Brady's truck, for the purpose of the interstate transportation, was by virtue of the trip-lease agreement under the supervision and control of the interstate franchise carrier. Brady's relation to the transaction during this period ceased to be that of an independent contractor and became that of a servant or employee of the defendant, for the reason that Brady could only operate an interstate transportation under the authority of the interstate franchise carrier, and the Johnsons could not escape liability by engaging an independent contractor to carry on this activity for them. For injury to third persons caused by the negligence of the driver of the leased truck, during the period of the lease, the franchise carrier which authorized the activity of the truck could not avoid liability. By virtue of the lease agreement, for the designated period, the truck remained under the supervision and control of the lessee for the limited purpose of safety to the public and safe delivery of the shipment. Virgil v. Riss & Co., supra.

While the lease agreement provided only for transportation of the cargo from Conover to Richmond, the plaintiff urges the view that its scope was not limited by the

delivery of the goods in Richmond, as it was in the contemplation of the parties to the lease that the truck would necessarily have to be returned to Brady at Conover before the transaction could be regarded as finished. This was the view of the Supreme Court of Missouri in Cotton v. Ship-By-Truck Co., 337 Mo. 270, 85 S. W. 2d 80, where it was held that the liability of the lessee did not end with the completion of the journey. Hodges v. Johnson, D. C., 52 F. Supp. 488.

In Costello v. Smith, 179 F. 2d 715, 717, 16 A. L. R. 2d 954, it was held that the franchise carrier lessee was not liable for an injury caused by the driver of the leased truck on the return trip, but it will be noted that the lease in that case specifically provided that upon discharge of the load at destination the lessee would immediately "deliver said vehicular equipment into the possession of the lessor or its agent at the point of discharge and all obligation and responsibility of the lessee under the terms of this lease shall immediately cease."

If Brady's driver Eugene Hester had been able to secure a return load, admittedly his agency and employment by defendants Johnson would have ended. Brady was Johnson's employee only for the purpose of the interstate transportation. His employment and authority to bind Johnson expired with the accomplishment of that purpose.

[3] Whether the lease terminated at Richmond or Conover, it is apparent that the trip contemplated by the lease had come to an end when the driver of the leased truck having delivered the cargo to the consignee returned the empty truck to the point of origin in Conover. Johnson's right of control or supervision of the transportation

of the truck had ceased. The interstate carriage for which Johnson's franchise was necessary was ended. At the time of plaintiff's injury Brady was using the truck for a trip to Hickory to receive his pay and check freight bills. We perceive no valid ground for holding that the relationship which the law created for the Virginia trip by the use of Johnson's permit continued thereafter to characterize Brady's activity on this trip to Hickory. His trip to Hickory to check the freight bill and collect his pay was in his own interest rather than in the service of Johnson. For this purpose the use of the truck was not required.

There was no controversy as to the essential facts. The verdict of the jury on the issue submitted, to the effect that on the occasion of plaintiff's injury Brady was not engaged in the performance of a service or mission for defendants Johnson, decided what the court might well have determined by sustaining defendants Johnson's motion for nonsuit, or by a peremptory instruction. In any event no legal harm has resulted to the plaintiff from the ruling of the court below. The action of the court in leaving the matter to the jury in the form submitted was the most the plaintiff could ask. He cannot now complain that the court failed to give a more peremptory instruction in his favor. In this view the exceptions to the charge brought forward in plaintiff's assignments of error cannot be sustained.

Plaintiff's recovery for his injury as against defendant Brady was not controverted, but his effort to establish liability therefor on the part of defendants Johnson must be held to have been precluded by the verdict and judgment. The result will not be disturbed.

No error.

Appendix C

DECISION IN GUDGEL v. SOUTHERN SHIPPERS, INC.—
387 F. 2D 723 (1967)
(U. S. COURT OF APPEALS—SEVENTH CIRCUIT)

JOHN T. GUDGEL, Plaintiff-Appellant,

v.

SOUTHERN SHIPPERS, INC., Defendant-Appellee.

No. 16013.

United States Court of Appeals
Seventh Circuit.

Oct. 26, 1967.

Action arising out of collision between automobile driven by plaintiff and a truck tractor driven by one defendant and leased to defendant common carrier. Plaintiff appealed from order of the United States District Court for the Eastern District of Illinois, William G. Juergens, J., which granted defendant common carrier's motion for judgment notwithstanding the verdict. The Court of Appeals, Hastings, Chief Judge, held, inter alia, that evidence failed to disclose that, at time of collision, operator of truck tractor, under lease to common carrier which allegedly was cancelled two days prior to collision, was undertaking business of carrier at time of collision.

Affirmed.

Mort A. Segall, Champaign, Ill., for appellant.

Charles R. Young, Graham, Meyer, Young, Welsch & Maton, Danville, Ill., for appellee.

Appendix C

Before HASTINGS, Chief Judge, and DUFFY, Senior Circuit Judge, and CUMMINGS, Circuit Judge.

HASTINGS, Chief Judge.

This case arises out of a collision between a car driven by plaintiff-appellant John Gudgel, a citizen of Indiana, and a truck tractor driven by defendant Bud Freischlag, a citizen of Illinois, at an intersection in Danville, Illinois, on June 30, 1963.

Defendants in addition to Freischlag are Southern Shippers, Inc., a Mississippi corporation and common carrier which had leased the tractor for a period of one year on November 8, 1962; Gene Moffett, an Illinois citizen whose name appears as owner-lessor on the lease agreement covering the tractor; Cecil Shockley, an Illinois citizen who had apparently purchased the tractor from Moffett prior to the collision and regularly drove the tractor; and Wally Fondaw, a Mississippi citizen who is president of Southern Shippers.

Appellant's complaint alleges that Freischlag negligently ran a stop light, thereby causing the collision and injuring plaintiff in his person and property. The case was tried to a jury.

At the close of plaintiff's case the trial court granted motions dismissing defendants Moffet and Fondaw from the case and denied defendant Southern Shippers' motion to dismiss. Southern Shippers moved for a directed verdict at the close of defendants' case, and the court denied its motion. The jury returned a general verdict against defendants Freischlag and Southern Shippers.

Appendix C

In answer to special interrogatories, the jury found that Southern Shippers did not own the tractor involved in the collision, that Freischlag was in the employ of Southern Shippers on the date of the collision, and that Freischlag was acting within the scope of his employment as agent of Southern Shippers at the time of the collision.

Southern Shippers moved for judgment notwithstanding the verdict on various grounds, including the absence of evidence to support the finding that Southern Shippers was liable for Freischlag's negligence. The trial court granted the motion.

Plaintiff appeals from the trial court's order granting Southern Shippers' motion for judgment notwithstanding the verdict. The jury's finding that Freischlag was negligent and that his negligence proximately caused injury to plaintiff is therefore not at issue. The sole issue is whether the trial court erred in setting aside the jury's verdict against Southern Shippers.

[1] This being a federal diversity negligence action, it is well settled that state substantive law must be applied. Here, it is the law of Illinois.

[2, 3] It is equally well settled that federal law controls on the procedural question inherent in granting a motion for judgment notwithstanding the verdict. We have consistently followed the rule that such motions should be denied "where the evidence, along with all inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions." Zink v.

Radewald, 7 Cir., 369 F. 2d 253, 254 (1966); Valdes v. Karoll's, Inc., 7 Cir., 277 F. 2d 637, 638 (1960); Smith v. J. C. Penney Co., 7 Cir., 261 F. 2d 218, 219 (1958).

[4-6] Under Illinois law, Southern Shippers' liability to plaintiff could be established on either of two bases. A master is liable for the torts of his agent committed while acting in the scope of his employment. Darner v. Colby, 375 Ill. 558, 31 N. E. 2d 950 (1941); Hulke v. International Mfg. Co., 14 Ill. App. 2d 5, 32-33, 142 N. E. 2d 717 (1957); Laver v. Kingston, 11 Ill. App. 2d 323, 137 N. E. 2d 113 (1956). The relationship of master and servant exists if the master has the right to control the servant. Darner v. Colby, supra; Hartley v. Red Ball Transit Co., 344 Ill. 534, 538-539, 176 N. E. 751 (1931); Gundich v. Emerson Comstock Co., 21 Ill. 2d 117, 123, 171 N. E. 2d 60 (1960). Illinois follows the "loaned servant" doctrine, that one in the general employment of one person becomes the servant of another to whom he is transferred for the performance of a specific task, if control of the employee is wholly transferred to the latter. Yankey v. Oscar Bohlin & Sons, Inc., 37 Ill. App. 2d 457, 463, 186 N. E. 2d 57 (1962); Gundich v. Emerson Comstock Co., supra.

[7] Even if Freischlag was employed by Shockley, the owner of the tractor, Southern Shippers might be liable. A common carrier operating under an Interstate Commerce Commission certificate is liable for the negligence of an independent contractor operating equipment leased to the carrier, if the contractor is operating by authority of the carrier's I.C.C. certificate and is carrying out the carrier's undertaking. Mellon Nat'l Bank & Trust Co. v.

Sophie Lines, Inc., 3 Cir., 289 F. 2d 473 (1961); Venuto v. Robinson, 3 Cir., 118 F. 2d 679 (1941), cert. den., C. A. Ross Agent, Inc. v. Venuto, 314 U. S. 627, 62 S. Ct. 58, 86 L. Ed. 504 (1941); Beers v. Indianapolis Forwarding Co., 43 Ill. App. 2d 303, 193 N. E. 2d 473 (1963); Louis v. Youngren, 12 Ill. App. 2d 198, 138 N. E. 2d 696 (1956). This is based on Restatement of the Law of Torts, § 428

> "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise, granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity."

In the instant case, it is undisputed that Freischlag was paid for his services by Shockley, not by Southern Shippers, and that Southern Shippers and Moffett, then the owner of the tractor, entered into a lease on November 8, 1962, which *by its terms* was in effect on the date of the collision. The lease is in evidence and provides that "the lessee shall have exclusive possession, control and use of the motor vehicle identified above for the duration of the lease." It is not disputed that Southern Shippers was a common carrier operating under an I.C.C. certificate.

Finally, the parties agreed that prior to the collision the Southern Shippers trailer towed by the tractor had been damaged when Shockley rammed an underpass in Chicago.

The precise issue in dispute is whether the evidence reasonably permits the conclusion that at the time of the

collision Freischlag was engaged in the business of Southern Shippers. If he was not, Southern Shippers is not liable under either the doctrine of *respondeat superior,* Swanbeck v. Hubbard, 336 Ill. App. 384, 84 N. E. 2d 159 (1949), or the public franchise rule, Kaplan Trucking Co. v. Lavine, 6 Cir., 253 F. 2d 254 (1958).

Plaintiff's theory of the case is that at the time of the collision Freischlag was driving the tractor from Decatur, Illinois, to a grain elevator near Milford, Illinois, on instructions from Southern Shippers to pick up a trailer loaded with corn. Southern Shippers' view of the case is that Freischlag was not its employee, that the lease of the tractor was canceled by Southern Shippers on June 28, 1963, two days prior to the collision, and that no instructions were given Shockley or Freischlag to operate the tractor after June 28.

[8] Considering all of the evidence, we do not believe the jury could *reasonably* conclude that Freischlag was undertaking the business of Southern Shippers at the time of the collision.

The relevant evidence tending to support plaintiff's position consists of the lease and the testimony of Freischlag and Michael Collins, a passenger in the tractor at the time of the collision.

Freischlag testified that he was driving the tractor to Hoopeston, Illinois, to puck up a Southern Shippers trailer and take it to a grain elevator north of Hoopeston to be loaded with corn. This was done, according to Freischlag, on instructions he and Shockley, the owner of the tractor, received by telephone from John Tudor, then secretary-treasurer of Southern Shippers, on June 29.

Collins corroborated Freischlag as to the destination and purpose of the trip, but testified that the corn was to be transported for Shockley. He made no mention of ownership of the trailer.

Evidence tending to show Southern Shippers' knowledge that Freischlag drove the tractor, and uncontested evidence of Southern Shippers' control and use of the tractor prior to June 28, 1963, relates to a period prior to the collision and supports only a slight inference that the tractor was being operated at Southern Shippers' direction and in furtherance of its business when the collision occurred. The lease, which gave Southern Shippers the right to control the tractor, supports a weak inference that the tractor was being operated under its control and in its business when the collision occurred.

The evidence in support of Southern Shippers' position is overwhelming. The president of Southern Shippers, Wally Fondaw, testified that he did not know Freischlag, that he canceled the lease on June 28, 1963, because Shockley had torn the top out of the company's trailer by hitting an underpass, that the trailer was damaged so badly that it was not suitable for transporting anything, and that no instructions were given to Freischlag or Shockley to do anything after they left the damaged trailer at the Bryce Farmers Grain Elevator in Milford on June 28, 1963. Lee Lautenschllager, the manager of the Bryce Farmers Grain Elevator at Milford, Illinois, testified that at Fondaw's request, a trailer with the roof "mashed" was parked at the elevator on or about June 28, 1963, and that it was incapable of transporting grain.

Plaintiff introduced into evidence the daily log for the tractor for June 30, 1963, the day of the collision. The

log was required to be made under I.C.C. regulations. It was signed by Shockley, and indicated that on June 30 the tractor was "off duty" at Decatur, Illinois.

The lease, which was also introduced by plaintiff bears the notation "cancelled 6-28-63" and "cancelled June 28, 1963" across its pages.

[9] When the evidence is so overwhelmingly on one side that the jury could not *reasonably* reach conflicting conclusions, a directed verdict or judgment notwithstanding the verdict is proper. O'Connor v. Pennsylvania R.R., 2 Cir., 308 F. 2d 911 (1962); State of Washington v. United States, 9 Cir., 214 F. 2d 33 (1954), cert. den., 348 U. S. 862, 75 S. Ct. 86, 99 L. Ed. 679 (1954).

We conclude that the district court did not err in granting the challenged judgment notwithstanding the verdict. The judgment appealed from is affirmed.

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1968

No. 1300

BOND TRANSPORTATION, INC.,
Petitioner,

vs.

EDWARD A. COX,
Respondent.

BOND TRANSPORTATION, INC.,
Petitioner,

vs.

MICHAEL F. MURPHY, etc., and DENNIS MURPHY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Statute and Regulations Involved

49 U. S. C. A. 304 (e) (printed in Petitioner's Appendix A, pp. 30a to 31a) authorizes the Interstate Commerce

Commission to prescribe, with respect to the use by motor carriers of motor vehicles not owned by them, in the furnishing of transportation of property, regulations requiring that:

> (1) any lease, contract or other arrangement shall be in writing and be signed by the parties thereto,
>
> (2) it shall specify the period during which it is to be in effect,
>
> (3) it shall specify the compensation to be paid by the motor carrier, and
>
> (4) it shall require that during the entire period of such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby.

The Statute further authorizes the ICC to prescribe any other regulations as may be "reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operations thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles."

Pursuant to this authorization, the ICC adopted regulations which are found in 49 C.F.R., Part 207—Lease and Interchange of Vehicles (printed in Petitioner's Appendix A, pp. 2a to 13a). They provide that an "authorized carrier" may not use equipment which it does not own unless there is a written lease (Section 207.4(a)(2)) for a minimum duration of 30 days (Section 207.4(a)(3)) which:

> "Shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement * * *." (Section 207.4(a)(4).

The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment (Section 207.4(a)(6)), and when possession by the authorized carrier ends it shall obtain from the owner of the equipment a receipt specifically identifying the equipment and stating therein the date and time possession thereof is taken (Section 207.4(b)).

Both statute (49 U. S. C. A. 304(e)) and regulations (Section 207.4(c)) provide for safety of operation and inspection of equipment.

The authorized carrier, during the period of the lease, contract or other arrangement shall properly and correctly identify itself on the leased motor vehicle, and if a removable device is used to identify the authorized carrier as the operating carrier, it shall be on durable material and "bear a serial number in the authorized carrier's own series" (Section 207.4(d)). Upon termination of the lease the authorized carrier shall remove any legend showing it as the operating carrier before relinquishing possession of the equipment (Section 207.4(d)(1)).

Statement

The New Jersey Supreme Court stated that the basic issue involved is whether by reason of the ICC regulations petitioner, Bond Transportation, Inc., as an authorized carrier, should be deemed to have had such possession and control over the leased motor vehicle at the time of the accident as to make it liable for negligent operation (Petitioner's Appendix B, p. 64a).

The facts are fully set forth in the decision of the Court (Petitioner's Appendix B, pp. 64a to 69a), from which it found that there was ample evidence for the jury to determine that the leased motor vehicle was in the exclusive pos-

session, control and use of the authorized carrier, that it had been engaged to operate in intrastate and interstate commerce, that the carrier qualified it to operate in interstate commerce, that it did in fact drive in interstate commerce and at the time of the accident it was engaged in an activity which was at least in part for the benefit of the carrier.

Thus there was sufficient evidence from which the jury could have found and did find that a lease existed between the owner of the leased motor vehicle and the authorized carrier at the time of the accident, that the carrier's name and ICC serial number were affixed to the leased vehicle, and that no receipt for the equipment had been secured by the carrier from the owner. Under those circumstances the provisions of Section 207.4(a)(3) of the ICC regulations, heretofore cited, apply, and in accordance therewith the leased motor vehicle is in the exclusive possession and control of the authorized carrier which assumes complete responsibility for operation.

The obligation rests upon the carrier to terminate the lease, obtain a receipt from the owner and remove its name and ICC serial number in order to avoid responsibility for future operation.

Even though the owner of the leased vehicle was driving home after the day's work for the carrier, the New Jersey Supreme Court noted that the proof justified a factual inference from which the jury could find that such operation served the special interest of and was of business benefit to both the carrier and the lessor (Petitioner's Appendix B, pp. 82a to 83a).

Reasons for Denying the Writ

1. The decision of the Court below is neither in conflict with nor contrary to the apparent thrust of the decisions

of various Circuits of the United States Court of Appeals cited by petitioner.

Costello v. *Smith,* 179 F. 2d 715 (2d Cir. 1950) and *Venuto* v. *Robinson,* 118 F. 2d 679 (3d Cir. 1941), cert. denied, 314 U. S. 627 (1941) have no application to these proceedings because they arose prior to the amended statute and ICC regulations heretofore cited. At the time *Costello* and *Venuto* were decided it was permissible for an authorized carrier to lease a motor vehicle to transport cargo on a one-way trip basis. When the cargo was unloaded, the lease and responsibility of the carrier terminated.

In *Costello* a collision occurred on the return trip. Judge Swan stated that if the accident happened on the outbound trip during the term of the lease the lessee-carrier would have been liable, but no liability could be imposed after the lease terminated. He noted,

> "So long as the properly constituted authority is content not to regulate further than it has the operation of empty trucks after the termination of a 'one-way lease', the courts may not properly by judicial decision supplement the commission's regulations."

Subsequently the regulations were amended as heretofore cited to require a 30 day minimum lease, and it is conceded by petitioner that the lease was in existence at the time of this accident (Petition, p. 3, footnote 1).

In *Venuto* plaintiff sought to recover for personal injuries not on grounds of statutory liability, but based upon the common law responsibility of one for negligent acts of another. The accident occurred while the trucker was hauling cargo for a common carrier and the recovery was affirmed on appeal. This 1941 decision is totally inapplicable to the case at bar.

In *Mellon National Bank & Trust Co.* v. *Sophie Lines, Inc.*, 289 F. 2d 473 (3d Cir. 1961) the Court held that even though the leased motor vehicle was in operation for some third person without the permission or knowledge of the authorized carrier, the latter is liable for negligent operation when its name and serial number appear on the equipment and it has not obtained a receipt for return of the vehicle to the lessor-owner. Indeed, respondents cited this case in support of their position, and the New Jersey Supreme Court relied upon it (Petitioner's Appendix B, pp. 85a to 87a).

Finally, *Gudgel* v. *Southern Shippers, Inc.*, 387 F. 2d 723 (7th Cir. 1967) is readily distinguishable. Here the appellate court found that there was insufficient evidence from which the jury could conclude that the leased motor vehicle was undertaking the business of the carrier at the time of collision. The evidence was overwhelming that the lease had been canceled two days prior to the accident and the carrier had not given any instructions to the owner or driver of the vehicle to undertake the carriage on that day. Petitioner quotes an excerpt from the case (Petition, p. 7) which confirms respondents' position that it is a question of fact whether the contractor is carrying out the carrier's undertaking.

None of these cases suggests that intrastate movement while under lease to an authorized carrier pursuant to the ICC regulations exempts the carrier from responsibility of operation, particularly when the movement is at least in part for the benefit of the carrier.

None of these cases are remotely in conflict with the decision of the New Jersey Supreme Court. Even *dicta* cannot be culled from these decisions to infer such a proposition.

2. In the past a conflicting State Court case of another jurisdiction has not ordinarily resulted in a grant of *certiorari* where the case at bar is in accord with the decisions of all other State Courts and all United States Courts.

In *Missouri Pacific Railroad Co.* v. *Elmore and Stahl,* 377 U. S. 134, 84 S. Ct. 1142, 12 L. Ed. 2d 194, reh. den., 377 U. S. 984, 84 S. Ct. 1880, 12 L. Ed. 2d 752 (1964) a decision of the Supreme Court of Texas reviewing ICC rules appeared to be in conflict with an almost contemporaneous decision of the United States Court of Appeals for the Ninth Circuit. *Certiorari* was granted. In contrast, the New Jersey Supreme Court decision is not in conflict with the decision of any United States Court.

Although it can be argued that the New Jersey Supreme Court decision is in conflict with that of one state court, *Schmidbauer* v. *Baltimore & Pittsburg Motor Exp. Co.,* 228 Md. 627, 181 A. 2d 325 (Ct. of App., Md., 1962), this, in itself, is insufficient grounds for *certiorari.* The New Jersey Supreme Court merely noted the apparent conflict (Petitioner's Appendix B, p. 84a) and the cited numerous cases from other states and Federal Courts in support of its decision (Petitioner's Appendix B, pp. 84a to 95a).

Simon v. *McCullough Transfer Co., Inc.,* 155 Ohio St. 104, 98 N. E. 2d 19 (1951) and *Eckard* v. *Johnson,* 235 N. C. 538, 70 S. E. 2d 488 (1952), cited by petitioner, are inapplicable since they arose years before the statute was amended and the ICC regulations adopted; and in both cases the lease had terminated.

Petitioner argues that the matter is in dispute as between State Courts of final resort and must be settled by the United States Supreme Court (Petition, p. 8). In all candor, petitioner should argue that it is the 1962 Maryland Court of Appeals case which is in conflict with State Courts of final resort and United States Courts of Appeal.

The New Jersey Supreme Court decision is in accord with every other State and all United States Courts of Appeal.

3. The decision of the New Jersey Supreme Court is in accord with a previous decision of the United States Supreme Court and with the legislative intent of the Congress.

In *American Trucking Associations* v. *United States,* 73 S. Ct. 307, 344 U. S. 298 (1953) Justice Reed reviewed the history of the statute and regulations, noting that prior to the requirement that leases be in writing, many were oral and some were concluded after one trip. Commenting upon this, he stated:

> "The use of nonowned equipment by authorized carriers is not illegal, either under the Act or the rules under consideration. But evidence is overwhelming that a number of satellite practices directly affect the regulatory scheme of the Act, the public interest in necessary services and the economic stability of the industry, and it is on these that the rules focus. * * * It was also alleged, and shown by evidence of some incidents, that the Commission's safety requirements were not observed by exempt lessors. * * * (344 U. S. at pages 304 and 305).
>
> "Because of the fact that the great bulk of the arrangements cover only one trip, leasing carriers have little opportunity or desire to inspect the equipment used, especially in cases where the agreement is made without the operator's appearance at the carrier's terminal. * * * Hence the carrier may not extend the supervision of rest periods, doctor's certificates, brakes, lights, tires, steering equipment and loading, normally accorded his own employees

> and vehicles, to equipment and drivers secured through lease. And the owner-operator himself is called upon to push himself and his truck because of the economic impact of time spent off the road and investment in repairs on his slim profit margin. Further, the absence of written agreements has made the fixing of the lessee's responsibility for accidents highly difficult." (344 U. S. at 305).

In response to an attack upon the regulations by the American Truckers Association, Justice Reed continued:

> "Moreover, we must reject at the outset any conclusion that the rules as a whole represent an attempt by the Commission to expand its power arbitrarily; there is clear and adequate evidence of the evils attendant on trip leasing. The purpose of the rules is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system." (344 U. S. at 310).

Congress enacted an amendment to 49 U.S.C.A. 304 (e) (1) and (2) on August 3, 1956 (Public Law 957, Chap. 928, 70 Stat. 983) (printed in Petitioner's Appendix A, pp. 30a and 31a) which clearly delineated its delegation of authority to the ICC, permitting it to adopt the regulations heretofore cited.

The legislative history of this Act, known as Senate Bill 898, appears in Volume 3, "U. S. Code Congressional and Administrative News", 84th Congress, 2nd Session, 1956, pages 4304 through 4307, and in the Congressional Record (House), Vol. 102, Part 9, page 12743. Excerpts from the report follows:

> "The affirmative authority granted to the ICC by this legislation will strengthen the Commission's au-

thority to deal with the abuses which have arisen from trip-leasing practices. * * *

"The leasing practices of authorized motor carriers have in the opinion of the ICC, presented troublesome problems for many years. * * *

"The entire Commission made its report on May 8, 1951 (52 M.C.C. 675) in which it adopted rules * * * requiring that every lease by an authorized motor carrier for the use of a motor vehicle is to be operated for the authorized carrier by the owner or by an employee of the owner of the vehicle, must be of at least 30 days duration and that compensation must be on a basis other than a division or percentage of revenues earned with the leased equipment.

"The Commission stated, in substance, that its rules were essential to maintain effective control over the operational safety, carrier responsibility and the economics of the motor carrier industry. * * *

"The Commission found, among other things, that in many instances when authorized carriers trip-lease vehicles owned by others the safety requirements imposed under Part II of the Act are not observed; that the practice of trip leasing makes it difficult to fix carrier responsibility; * * *"

The clear intent of the legislature is to provide for safety and fix responsibility in regard to those leased motor vehicles which an authorized carrier qualifies for interstate carriage. Having chosen to qualify its leased equipment for interstate carriage, and having used it previously in interstate carriage, petitioner cannot now avoid its fi-

nancial responsibility resulting from negligent operation merely upon the pretext that at the moment of operation the vehicle was not traveling interstate.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be denied.

Respectfully submitted,

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